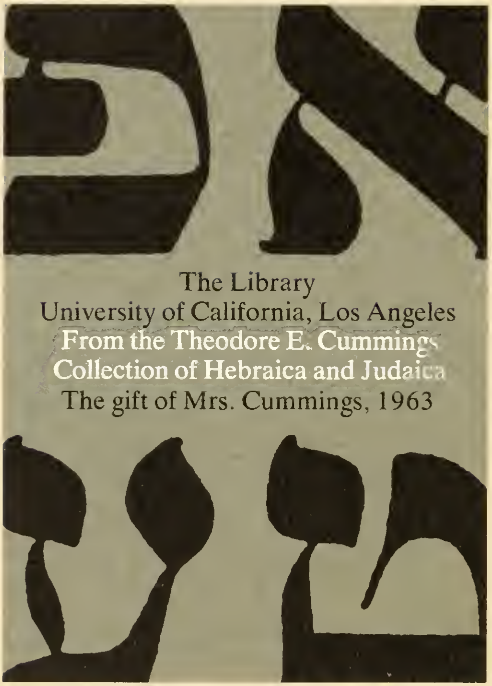

The Library
University of California, Los Angeles
From the Theodore E. Cummings
Collection of Hebraica and Judaica
The gift of Mrs. Cummings, 1963

B/2,75

(33.)

Mishnah

A Digest of the Basic Principles of the Early Jewish Jurisprudence

Baba Meziah (Middle Gate)
Order IV
Treatise II

Translated and Annotated
By
Hyman E. Goldin, LL.B.
of the New York Bar

G. P. Putnam's Sons
New York and London
The Knickerbocker Press
1913

Copyright, 1913
BY
HYMAN E. GOLDIN

The Knickerbocker Press, New York

BM
505
A3G5ml
1913

PREFACE

THIS work is an attempt to acquaint the reader with the fundamental principles of law laid down in the Mishnah. It is not designed to give an exhaustive treatment of the various branches of the law embodied in the present treatise. Of the numerous rules and theories of law laid down in works other than the Mishnah, only such as tend to convey a thorough comprehension of the Mishnaic principles have been given in the annotations. And for the like reason, no attempt has been made to deal with the subject of comparative jurisprudence.

The original arrangement of the chapters and the Mishnahs therein contained has been preserved in this work; for had a new arrangement been made, in conformity with modern logic and present-day conceptions, it would cause great inconvenience to a student who

2094929

might wish to follow the original text of the Mishnah.

As far as possible, a literal translation of the original text has been adhered to. Occasionally, however, for one reason or another, it has been deemed expedient to give a free rendering of certain terms and expressions.

With reference to the interpretation of the provisions and terms of the Mishnah, an attempt has been made to follow authoritative sources,—such as the Gemara, Alfasi, Maimonides and the like. In many instances, however, the theories and principles upon which certain rules of law had been founded could not be elucidated either from the Mishnah or from any of the commentaries thereon. As a result, it has been impossible to avoid entirely advancing original speculations.

An introduction to the present treatise has been prepared with a view to prove that there was a certain unity of thought in the mind of the redactor of the Mishnah when he embodied in the present treatise the various branches of the law.

In the Appendix is given a compendium of biography of the jurists mentioned in this treatise, in order to facilitate the task of the student who reads this work with the intention of making a careful study of comparative jurisprudence. It likewise contains a glossary of works, coins, weights and measures.

The editor contemplates translating and annotating all treatises of the Mishnah that deal mainly with jurisprudence. The reason the editor preferred in the present volume to begin with the *second* treatise of the Order Nezikin is that this treatise is considered among scholars versed in the Talmud to be the "key" to the entire Order.

H. E. G.

NEW YORK,
January, 1913.

CONTENTS

CHAPTER PAGE

INTRODUCTION TO BABA MEZIAH . . 1

I.—ARTICLES LOST AND FOUND . . 7
COURT DOCUMENTS . . . 17

II.—INTRODUCTION 28
ARTICLES LOST AND FOUND (*Continued*) 30
HELPING IN UNLOADING AND RELOADING ANIMAL. . . . 46

III.—BAILMENTS 50

IV.—INTRODUCTION 73
BARGAIN AND SALE OF PERSONALTY . 77

V.—INTRODUCTION 98
USURY AND USURIOUS CONTRACTS . 99

VI.—CONTRACTS OF HIRING . . . 122
LIABILITY OF PLEDGEES . . . 132
REMOVAL OF BAILMENT BY BAILEE . 133

VII.—HIRING OF LABORERS. . . . 136
THE FOUR BAILMENTS . . . 142
CONDITIONS 146

CHAPTER PAGE
VIII.—BORROWING OF ANIMALS . . 151, 157
EVIDENCE 152, 158
OWNERSHIP IN TREES AND NOT IN THE SOIL 161
LANDLORD AND TENANT . . . 162

IX.—LETTING LAND TO FARM . . . 168
WAGES 177
PLEDGES 181

X.—RIGHTS OF UPPER AND LOWER OWNERS 185, 187, 193
RIGHTS OF UPPER TENANT . . 186
USE OF PUBLIC THOROUGHFARES . 192

APPENDIX 195
INDEX 199

Mishnah

MISHNAH

INTRODUCTION TO BABA MEZIAH

Baba Meziah (Middle Gate) is the second treatise of the Order Nezikin (Damages), the fourth of the six Orders into which the Mishnah, in its present form, was compiled by Rabbi Judah ha-Nasi (the Prince) about the year 219 C. E. It is the second of the three Gates forming the first three treatises of the fourth Order.

This treatise deals with the acquisition and transfer of title to *personal property*. Personal property includes goods, money and all other descriptions of movable property, which may accompany the owner's person wherever he may be.

Property in chattels may be either in *possession*, *i. e.*, when a man has not only the right to enjoy, but has the actual enjoyment of, the chattel; or it is in *action*, where a man has only a right of ownership, without any occupation or enjoyment. The former, or property in possession, is divided into two classes, *absolute* and *qualified* property.

Property in *absolute* possession is where a man has, solely and exclusively, the right and also the occupation of any chattel; so that it cannot be transferred from him or cease to be his, unless by his own act or default on his part.

Property is of a *qualified* or special nature when, on account of the peculiar circumstances of the owner, there is no absolute ownership. In the case of bailment, or delivery of goods to another for a particular purpose, there is no absolute property vested in either the bailor or the bailee. For the bailor has only the right to, and not the immediate possession of, the chattel bailed, and the bailee has the possession of it and only a temporary right thereto, but it is a qualified property vested in both of them.

Property in *action* is where a man has not the occupation of, but merely a right to occupy, the thing. The possession thereof may, however, be recovered by a suit or action at law; hence, the thing so recoverable is called a *thing* or *chose* in action. Thus in the case of a sale, where the price for the subject-matter of the sale is not paid in ready money, the vendee becomes indebted to his bailor for the sum agreed upon, and the vendor has a *chose* in action as a result of such a debt. In bailment, if the bailee loses or detains the thing bailed to him, he becomes indebted to his bailor to the value of such thing. The reason for such indebtedness is his implied or express contract either to execute the trust reposed in him (Sect. 2, *infra*), or repay the bailor the value of the thing bailed. In short, a *chose* in action is a determinate sum of money due to any person, by reason of a certain contractual relation or obligation, but is not paid, remaining in action merely.

Furthermore, property in chattels, as well as in land, may be either *corporeal* or *incorporeal*. *Corporeal* property consists of objects affecting the senses; such as may be seen and handled by the body. *Incorporeal* property is not the object of sensation, can neither be seen nor handled, but is the creation of the mind, existing in thought only. Incorporeal property consists principally of *easements*. (*Vide* Sect. 5, *infra*).

The present treatise speaks of acquisition of title to personal property by *occupancy* and by *contract*.

Property in goods or chattels may be acquired by *occupancy* either of objects *ferae naturae*, or of movables which are found upon the surface of the earth, and are supposed to have been abandoned by the last proprietor, and as such are returned into common stock; they, therefore, belong, as in a state of nature, to the first fortunate finder, who thereby becomes the first occupant (Chapters I and II).

The most usual contracts, whereby the right of possession or that of a *chose* in action may be acquired, are: 1. That of sale and exchange. 2. That of bailment (including hiring, borrowing and pledges). 3. That of employment. 4. That of chattels real. 5. That of easement.

1. Sale and exchange are transfers of property from one man to another, in return for some consideration (Chapter IV; see also Introduction to *l. c.*).

2. Bailment, including hiring and borrowing of chattels, is a delivery of goods in trust, upon a contract either express or implied, that the trust shall be faithfully executed on the part of the bailee, and that restitution of the thing bailed shall be made by him as soon as the purpose of the bailment shall have been carried out (Chapters III, VIII and part of Chapter VI). The bailee or the bailor is entitled to an action, in case the goods bailed be damaged or taken away while in the former's possession: the bailee, on account of his immediate possession; the bailor, because the possession of the bailee is his possession also.

Pignus or pledge is where the thing bailed is given as security for a debt; when a person borrows money, and gives some article of value to be held as security (Chapter VIII).

3. Employment is a contract whereby a man, in consideration of some compensation given or promised to be given by another man,

agrees to perform, or actually performs, certain work, labor or services (Chapters VI and VII).

4. Contracts involving chattels real are: when one man, by reason of a certain consideration, transfers *temporary* possession of a thing which is realty and cannot be classed as personal chattels, such as fields, houses, etc. In other words, chattels real are such as partake of the nature of real property or arise therefrom (Chapter IX and part of Chapter X).

5. Easement is where the owner of one tenement, called the dominant tenement, acquires a right, by contract or otherwise, to make use of the tenement belonging to another man, called the servient tenement (Chapter X).

Any contract which is effected for the purpose of transferring a right or a property of any nature, although it is created by the voluntary act of the contracting parties, may be of such a character as to render it illegal and consequently not obligatory upon the parties; *e. g.*, when the contract involves a transaction which cannot be sanctioned by law for the reason that it is usurious (Chapter V).

CHAPTER I

ARTICLES LOST AND FOUND—COURT DOCUMENTS[1]

Mishnah I. Two persons (coming to a court of justice) *hold* a garment, and one of them says: "I found it," and the other one says: "I found it." If one of the claimants says: "The whole of it is mine," and the other one says: "The whole of it is mine," each has to take an oath that *no less than one-half* of such garment belongs to him, and the garment (or the value thereof) is divided equally between both litigants (1); and if one of

(1). In the Jewish system of jurisprudence, any unsworn statement made in court in support of a claim or in denial thereof, had the same weight in evidence as the sworn testimony of a witness in the modern system of jurisprudence. The veracity of even an unsworn statement was presumed as a matter of law, the claimants says: "The whole of it is mine," and the other one says: "Half of it is mine,"

---

[1] *Vide* Introduction to Chapter II, *infra.*

because every person was favored with the presumption of honesty, that he would not intentionally violate the commandment of the Pentateuch (Ex. xx, 16): "Thou shalt not bear false witness against thy neighbor."

An oath was administered to a defendant only then when there was a presumption existing in favor of the plaintiff. The effect of the oath taken by the defendant was to rebut such presumption, to balance the evidence produced on the part of the plaintiff, and to entitle the defendant to a recovery, since the latter, in order to be entitled to a recovery, need come forward with evidence sufficient only to *balance*, and not to *outweigh*, the evidence produced by the plaintiff. (For a full discussion of the oath, *vide Shebuoth.*)

In the case as presented in the text, it was essential that both of the parties to the controversy should be in actual possession of the article in dispute, in order that either one of them should be entitled to obtain any part thereof by an oath. For, if only one of the parties has actual possession of the article, and the other party merely makes a claim of having a right to the possession thereof, the latter, as party plaintiff, cannot by a mere oath obtain a recovery of his claim. It is a well established principle of law in Jewish jurisprudence that *possession is presumptive evidence of ownership; i. e.*, it is presumed as a matter of law that, unless proven to the contrary, if a man has immediate possession of a thing, he is lawfully entitled to the ownership thereof (*Shebuoth* 32b; *Baba Bathra* 33b).

then the one who claims title to the entire garment shall take an oath that no less than three-

If, therefore, A claims title to a certain thing of which he has immediate possession, and B too lays claim to the ownership of such thing, A is entitled to the entire article in dispute, as he is favored with the presumption of possession (*Gemara*[1] 6a; Alfasi; Maimonides, *Laws of Pleading*, Chapter IX, Law 13). B cannot be entitled to a recovery by taking an oath to substantiate his claim, because he is the plaintiff in the case and therefore has the burden of proving his side by a preponderance of evidence (*Baba Kama* 46a). As the effect of an oath, in law, would be to merely rebut the presumption of immediate possession existing in favor of A, it would only *balance*, but not outweigh the evidence of A's presumption.

The oath imposed upon the parties in the present case is purely rabbinical, for according to the Mosaic Law the parties would have to divide the article in controversy without taking an oath, as the contention of each of them is supported by the presumption of possession. The object of imposing such an oath upon the parties is to prevent people from forcibly obtaining possession of articles belonging to their neighbors and setting up a fictitious claim thereto, which might result if a recovery were permitted without the administration of an oath (*Gemara* 5b). It is a well established principle of law in Jewish jurisprudence that a person who might attempt obtaining money quarters belong to him, and the one who claims title to one-half shall take an oath that no less than one-quarter belongs to him; the

---

[1] The citation *Gemara* in this work refers to the present treatise, *Baba Meziah*.

from his neighbor without just cause is not necessarily to be suspected of false swearing (*l. c.*). The law, therefore, presumes that a man will refrain from swearing falsely, although he is unscrupulous otherwise.

Particularly should an oath be imposed upon the parties when their controversy is founded upon a claim of title to a lost article. For a man, although honest otherwise, might upon seeing some one pick up a lost article, argue: "My neighbor has invested no money in such article, I too will take hold of it and contend that both of us have found it" (*Gemara* 2b). The law, presuming each of the claimants to be honest otherwise, imposes an oath upon him, which he would refrain from taking if his claim be unfounded.

The reason each one of the claimants has to take an oath that *no less than one-half* of the garment belongs to him is that should he swear that he has a right to *one-half* of the garment, it will directly conflict with his previous statement that he is entitled to the ownership of the entire garment. The court, being reluctant to compel the litigant to contradict directly his own statement, requires him to swear that *no less than one-half of the garment belongs to him*, which can be construed to mean: "As for myself, I still uphold my previous contention that I am entitled to the entire garment. According to the opinion of the court, however, that as much credence is due to the claim made by my opponent as to mine, I take oath that surely former takes three-quarters of the garment, and the latter one-quarter (2).

Mishnah II. If two persons ride on an animal, or one of them rides on it and the other one leads it, and one says: "The whole of it is mine," and the other one says: "The whole of it is mine," each has to take an oath that no less than one-half of the animal belongs to him, and both of them divide it equally (3).

---

no less than one-half of the garment belongs to me" (*Gemara* 5b).

(2). In the latter case, A claims title to the entire garment because he contends that he himself has obtained possession thereof *a priori*, and B lays claim to one-half of the garment, contending that both of them have obtained possession thereof at one and the same time. B admits that one-half of the garment belongs to A, and their controversy is for the remaining half. They consequently have to take an oath, as provided for in the previous case mentioned in the text, and they divide that half equally between themselves.

(3). When one claims title to a lost article, he must prove that he has obtained possession thereof *a priori*. Thus, in order to obtain that possession, he must perform such an act as would be recognized in law as sufficient to vest title in the vendee in cases of bargain and sale. (*Vide* Introduction to Chapter IV, *infra*.)

The principle of law involved in this Mishnah is

When they admit (that both of them have obtained possession at one and the same time), or they have witnesses (to testify to that effect), they divide the article in dispute without taking the prescribed oath (4).

that when one finds a lost animal and rides on it, such an act constitutes the necessary possession which must be acquired in order to obtain title to a lost article. It stands also for the further principle that the act of leading an animal is analogous to that of riding on it; "leading" constituting legal possession (*Gemara* 8a; Rashi to 2a).

(4). Maimonides in his *Commentary on the Mishnah* says that the parties to the controversy in this case had commenced legal action before a court, and a decision had been rendered that they must take the oath provided for by law in such a case and divide the article equally. Before, however, the oath was actually administered, they made an admission, or procured witnesses to testify to the effect that both of them had obtained possession of the lost article at one and the same time. The apparently unnecessary rule of law laid down in this Mishnah, then, stands for the principle that, if an admission is made, or witnesses are procured, by the parties subsequent to the *res adjudicata* (*i. e.*, subsequent to the court's adjudication of the case), it has the effect of annulling the decision rendered.

The *Gemara* (p. 8a) infers from the rule of law stated in the Mishnah that when A takes a lost article into his possession with the view of obtaining title

Mishnah III. A man, riding on an animal, sees a lost article (lying on the ground nearby) and says to his neighbor: "Give it to me." The latter picks it up and says: "I myself have acquired title to it;" then title vests in him. If, however, after delivering it (to the supposed principal), he says: "I myself have acquired

thereby on behalf of B, the latter acquires title to the lost article by reason of A's possession, although he has never authorized A to act for him as his agent. Otherwise, the two litigants, in the case stated in the text, would be unable to acquire joint ownership to a lost article even when they admit that both of them have picked it up at one and the same time, as neither authorized the other to act as his agent. That part of the article, therefore, which is in the possession of one of the parties, would, in the eyes of the law, be considered as lying upon the ground as far as the other party is concerned, and *vice versa*. Such acquisition of possession on the part of the litigants would not suffice to vest title in them either severally or jointly, because the law is that one must acquire possession of the whole of the lost article to the exclusion of others in order to obtain title thereto. But if one picks up only a part of the lost article, while the remaining part lies upon the ground, such an act does not constitute legal possession, and consequently the one who subsequently obtains possession of the whole of such lost article is entitled to priority.

title to it first," his claim is of no effect whatever (5).

(5). In the Jewish law, the relation of principal and agent can be created either by the express consent of the agent to become such, or by the acquiescence of such agent as indicated by his conduct.

In the present case, A requests B to become his agent for the purpose of *giving* a lost article to him. Before B actually complies with the request of A, the presumed principal, and before he gives such article to him, there is nothing to indicate his intention or acquiescence to become A's agent. His contention, that he picked up the lost article for himself, is therefore well founded. But after he actually delivers such article to A, he cannot then turn around and say: "I never intended to become your agent, and I picked up the article not in order to comply with your request and to become your agent, but I picked it up with the view of obtaining title to it for myself." His conduct, in executing the act which the agency called for, clearly indicates his assent to become A's agent for that particular purpose; for how are we able to divulge one's secret intents otherwise than by his conduct?

When, however, A requests B to become his agent for the purpose of *picking up* a lost article for him, with the view of obtaining title to it by means of such agency, and B, without saying anything to the contrary and apparently in compliance with A's request, does pick it up, his silence in such a case indicates his acquiescence to become A's agent (*Gemara* 10a). The law in certain instances requires a man to speak, and when he does not, he is silent at his own peril.

Mishnah IV. If a man sees a lost article and falls on it, and at the same time another one comes along and seizes it, the latter acquires title thereto (6). When a man sees people running after a lost article (which was in his field), after a lame stag or after unfledged pigeons, and says: "My field shall acquire title for me," his field vests title in him (7). If, however, the stag was running in its natural way, or the pigeons were fledged, and he says: "My field shall acquire title for me," his saying is of no effect whatsoever (8).

---

(6). The mere act of falling upon a lost article does not constitute the necessary taking possession thereof. The one who fell upon the lost article cannot, therefore, obtain title thereto in priority to the one who took actual possession thereof. (*Vide* n. 3, *supra.*)

(7). Title vests in the owner of the field in this case, because his field is considered in law as his possession. It is, however, essential in such a case that the field be well guarded, by fence or otherwise, and if it is not well guarded, it is necessary that the owner shall stand nearby and be in a position to obtain, in person, immediate possession of the lost article. If neither of the above requisites exists, a man's field does not constitute his possession for the purpose of acquiring title to a lost article (*Gemara* 11a).

(8). It is of vital importance in cases of animals

Mishnah V. The articles found by a man's minor son or daughter (9), or by his Canaanite bondman or bondwoman, or by his wife, belong to him (10). The articles found by a man's son or daughter who is of age, or by his Jewish man-servant or maid-servant, or by his wife whom he has divorced, although he has not paid her (the amount due under) their contract of marriage, belong to the finder.

ferae naturae that the owner of the field shall either obtain absolute control of the animal, or that he shall be in a position to obtain immediate control thereof, in order to acquire title thereto. Otherwise, the animal cannot be considered to be in his possession, even when it is in his field. The condition of the stag or that of the pigeons, as stated in the Mishnah herein, is simply illustrative as to when one is generally in a position to obtain control, but is of no moment (*Gemara* 12a).

(9). The *Gemara* (p. 12b) says that the rule of law laid down in this Mishnah is not to be literally construed. The age of the son or daughter is absolutely immaterial. If a child is not supported by his parents, the articles he finds are his even when a minor; if he is supported by his parents, the articles he finds belong to the parents even when of age (Alfasi; Maimonides, *Laws of Lost Articles*, Chapter XVII, Law 13).

(10). This rule of law had been enacted by the Rabbis in order to preserve peace between husband and wife, and parent and child (*Gemara* 12b).

Mishnah VI. If a person finds a document of indebtedness which contains a lien clause, he shall not surrender it (to either party named therein), because the court will enforce the document (against purchasers of the debtor's real property) (11). If, however, the

(11). When a document, made by a debtor to his creditor, sets forth that the debt shall be satisfied from the real property owned by the debtor, the creditor acquires thereby a lien on all the realty owned by the debtor at the time such document is executed. If the debtor sells such property before he satisfied the debt, the creditor may follow it into the hands of the purchasers, as they are presumed to have had knowledge of the existence of the document and the lien that it imposes upon the debtor's real property in favor of the creditor.

The act of executing a document of indebtedness in open court, which also required the attestation of two or more witnesses, had, in those days when people as a rule lived in small communities, the same effect as the modern system of recording encumbrances upon real property, in that it gave notice to the world of the existence of such an encumbrance. To a purchaser, therefore, who bought the property, so encumbered, from the debtor, before the debt due by virtue of the document was satisfied, the principle of *caveat emptor* (let the buyer beware) is applicable. Such purchaser had the remedy of seeking redress against his grantor, if the property was deeded to him with warranties lien clause is omitted in the document, the finder shall surrender it, because the court will not enforce it (against purchasers of the debtor's real property). This is the opinion

that it had been free from encumbrances (*Gemara* 14a).

In the Mishnah now under discussion, the document is not surrendered to either party therein named, on grounds of public policy, even when the creditor claims that he never received payment for the debt mentioned in the document, and the debtor admits that he did not pay. It is presumed as a matter of law that the debt is paid, but that the debtor entered into a collusion with his creditor to seize the property conveyed by him and to divide the same among themselves (*Gemara* 13a; Alfasi; Maimonides, *Laws of Lost Articles*, Chapter XVIII, Law 1). The debtor's admission of liability cannot be taken into consideration in this case, because it is probable that he holds a release from the debt, and that he conveyed the property in question without warranties that it had been free from encumbrances. Such an admission would, in such a case, consequently not be against his own interest, because neither could the debt be collected from him again nor would he be held liable to his grantees in case the property was seized by the creditor. It is, therefore, required that the creditor, in order to be entitled to seize the property to satisfy the debt, come forward with evidence sufficient to rebut the presumption thus raised in favor of the grantees.

of Rabbi Meïr. The sages (12), however, say: "The finder shall not surrender the document in any event, because the court will enforce it (against purchasers of the debtor's land)" (13).

The reason the presumption of payment and collusion is raised in this case is, as stated in the *Gemara* 12b, because of the fact that the document was lost. The system of recording obligations or encumbrances of any nature was not in practice under the Jewish procedure. The sole evidence, therefore, of any obligation or encumbrance was the document in itself. The presumption consequently was that had the document not been paid, the creditor would have taken the greatest precaution not to lose the same (Rashi to *l. c.*): for valuable articles are less frequently lost than valueless ones.

The document cannot likewise be surrendered to either one of the parties thereto who is able to describe the marks of identification such document bears, for the reason that the debtor as well as the creditor is acquainted with such marks of identification, and therefore it cannot be ascertained thereby whether the creditor has lost it and it is not paid, or the debtor has lost it and it is paid. (*Vide* note 18, *infra.*)

(12). By the term *sages* is meant the majority of the school; hence, the weight of opinion.

(13). The opinion of the sages was that, unless there is an express provision to the contrary, every document of indebtedness creates a lien upon the debtor's real property, owned by him at the time such document is executed. The omission of such lien clause,

Mishnah VII. If one finds a bill of divorce, a deed of manumission, a will, a deed of gift, or a release from a debt, he shall not surrender it (to the party therein named), for it is probable that it was indeed executed, but the party who wrote it bethought himself and did not deliver it (to the person for whose benefit it was written) (14).

according to their opinion, is due to a mere mistake on the part of the scribe, and hence is of no legal consequence; for there is no doubt that the creditor who took the document had intended that the amount loaned by him should be secured by all the property of the debtor (*Gemara* 14a). Their opinion is the prevailing law (Alfasi; Maimonides, *Laws of Lost Articles*, Chapter XVIII, Law 1).

(14). The documents enumerated in this Mishnah are of no validity without actual delivery, and if, therefore, no delivery is proven, shall not be surrendered to the parties for whose benefit they were written. If, however, the one who has executed such documents consents to have them delivered to the parties therein named, the finder does comply with his request.

The last named rule of law, however, is subject to the following modifications:—

When a deed of gift is found, it shall not be surrendered to the donee named therein, on grounds of public policy, even when instructions to that effect are given by the donor. The law is well established that a per-

Mishnah VIII. If one finds a document relating to legal assessment (*i.e.*, the court's

son cannot revoke a conveyance made by him in the nature of a gift, and if several donees are possessed of deeds of gift for one and the same piece of property, executed by one and the same donor, or by those who immediately derive their title thereto from such donor, it is the one who is possessed of the deed executed and delivered to him first that succeeds. When, therefore, a deed of gift is found, it is not surrendered to the donee therein named, even when the donor consents to such a surrender, because such present delivery may tend to prejudice subsequent donees in this wise: A, the donor, originally intended to convey, by gift, the property described in the deed found, to B, the donee therein named. Thereupon, and before A delivered such deed to B, he executed and delivered, at a subsequent date, another deed of gift for the same piece of property to C. A, the donor, wishing to revoke such conveyance made to C and not being able to do so, consents that the finder shall deliver the deed, found by him, to B, the first intended donee. B will then produce his deed, which bears a prior date than the one executed and delivered to C, and claim that the delivery of such deed was made to him immediately upon the execution thereof; thus recovering the property conveyed to C, who is legally entitled thereto, as the delivery of the deed to C was in reality made by the donor prior to the delivery of the deed to B. A and B will then divide between themselves the property so seized from C. The court, therefore, says to the donor: "If you desire that title to the property valuation of the defendant's property to sat-

described in the conveyance shall vest in B, who is the donee therein named, why not convey it to him now? And if you executed and delivered another deed of gift to another donee for the same property, prior to the one you will execute now, such donee will not be injured by your present conveyance, as he will have priority" (*Gemara* 19b). B, therefore, in order to be entitled to the deed found, must come forward with evidence to prove when the delivery of such deed was made to him by the donor.

A will, however, may be revoked by the legator, and when two wills, bearing different dates and devising the same piece of property, are produced for probate, it is the one which was executed and delivered last that is valid. If, therefore, a will is found, and A, the legator, consents that it be surrendered to B, the legatee therein named, his instructions are complied with. If A did not deliver the will in question to B, immediately upon the execution thereof, and thereafter, and prior to the present delivery of the will to B, executed and delivered another will to C, such subsequent legatee will in no way be prejudiced or injured by this present delivery to B, because the law being, as stated herein, that a legator may revoke his will, and that the last will only is valid (*Gemara l.c.*).

A deed of gift may likewise be so made as shall partake the nature of a will, in that the donor reserves to himself the right to revoke the same; *e. g.*, when the donor inserted a provision in the deed, whereby the property was conveyed, that such gift should go into effect and become valid only upon the death of such isfy the judgment obtained by the plaintiff),

donor, thus reserving the right to revoke the same during his lifetime. A deed made as aforesaid may likewise be surrendered to the donee therein named, if the donor consents to such a surrender (*Gemara* 19a).

When a will is found subsequent to the death of the legator, and the heirs of such legator consent that the will be surrendered to the legatee therein named, their instructions are not complied with. In the last named case, it is probable that the legator intended to bequeath the property to the legatee named in the will, but thereafter reconsidered the matter and did not deliver such will to the legatee. Subsequent to the death of the legator, his heirs conveyed the property mentioned in the will, in the nature of a gift or a sale, to a different person. Such heirs now wish to revoke the gift or rescind the sale made by them, and, not being able to do so, say to themselves: "We are unable to revoke or defeat our conveyance; we will, therefore, claim that the property conveyed by us had been devised by our father during his lifetime, and consequently our conveyance made subsequent to such devise is of no effect whatever. And when the legatee will recover the property from our donee or grantee, we will divide the same among ourselves." The court then says to the heirs: "If you desire that title to the property mentioned in the will shall vest in the legatee therein named, why not convey it to him now? And if subsequent to your father's death, you conveyed the same property to some one else, such donee or grantee will sustain no loss by the conveyance made by you now, as his document will bear a prior a grant of alimony (15), a deed attesting Halizah (16), a (minor's) letter of protest (17), a

date and consequently he will have priority" (*l. c.* 19b).

The reason collusion is feared in cases where the documents were lost and not in any ordinary case is, as stated in note 11 *supra*, that the fact that the document was lost raises a presumption that it is of no validity.

As to the laws regarding the surrender of a bill of divorce, *vide Gittin*, Chapter III, Mishnah 3.

(15). A grant of alimony is a document executed by a person who, upon marrying a widow or a divorced woman who has had a daughter of her prior marriage, obligates himself to support such daughter (Rashi to *Gemara* 20a; Bertinoro). Or, according to the explanation of Maimonides in his *Commentary on the Mishnah*, a grant of alimony is the power given by the court to a married woman to sell her husband's property for the purpose of supporting herself and her children, when she was abandoned by him. (*Vide Ketuboth*, Chapter XIII, Mishnah 1.)

(16). "Halizah" is when a person dies leaving a widow but no children, his older brother must marry the widow. When he refuses to do so, the court, after performing some ceremonial process, commits such refusal to writing. (*Vide* Deut. xxv, 5–10.)

(17). A minor female (from the age of three to the age of twelve and one day) might be given in marriage by her mother or brother, in case of her father's death. Such marriage, however, did not require a divorce to dissolve the same, for it was invalid if not ratified by document referring to the selection of arbiters (18), or any other document properly executed by the court, he shall surrender it (to the party for whose benefit it was executed). If one finds a document of indebtedness in a small leather bag or writing case, or a roll or batch of documents, he shall return it (19).

her after she attained the age of maturity (generally thirteen years). During her minority, she might at any time declare her aversion to her husband and leave him without a divorce. This declaration was generally made in the presence of three witnesses, embodied in a document and attested to by the witnesses. (*Vide Yebamoth*, 107a *et seq.*)

(18). The issue of fact or of law was, in the Jewish procedure, joined in the following manner: Each of the parties to an action selected for himself one of the members of the tribunal, which generally consisted of not less than three, to prosecute or defend his case. The party stated the facts constituting his case or defense before the judge selected by him, and these facts were written down by the judge in a document, and attested to by the court. The party was then compelled to abide by such facts and could not at the trial bring in any evidence or prove any matter which was irrelevant to his cause. (*Sanhedrin*, Chapter III, Mishnah 1; Maimonides and Bertinoro to *Baba Bathra*, Chapter X, Mishnah 4.)

(19). The finder shall return the documents, found in a small leather bag or writing case, to the

How many documents constitute a batch? Three bound together. Rabban Simeon ben Gamaliel says: "(When the documents found in a roll or a batch set forth that) one person has borrowed money from three different creditors, the finder shall surrender them to the debtor; (and if they set forth that) three different persons have borrowed money from one creditor, the finder shall surrender them to the creditor" (20). If a person finds a document (which was deposited with him)

---

one who is able to describe the marks of identification which such bag or case bears. (Compare note 11, *supra*.) So in the case when the documents are found in a batch or a roll, they can be identified by the person who has lost them by either giving the exact number of the documents (*Gemara* 23b), or by describing the manner in which they were rolled or tied together (*l. c.*).

(20). When, however, the several documents thus found are written in the same handwriting, the finder shall not surrender them to either party therein named even in the case mentioned in the text, because it is likely that the scrivener who wrote such documents has lost them. But when they are in different handwritings, he shall surrender them as stated by Rabban Simeon, because the fact that they were found together clearly indicates that they were lost by one and the same person (*Gemara* 20b).

among his papers, and he does not know its nature (*i. e.*, whether the document is paid and the debtor has deposited it with him, or it is unpaid and the creditor has deposited it with him), it shall remain with him until Elijah will come (21). If there is a postscript attached to the documents, you must be guided by the postscript (22).

(21). According to the legendary belief of the Jews, the Prophet Elijah will appear to announce the arrival of Messiah, and he will then clear up all questions of law and fact. Hence, whenever the Talmud is uncertain as to how to decide a certain question of law or of fact, it says that it will remain so undecided until Elijah will come, meaning thereby that it will remain doubtful until some one will appear who will be in a position to clear up such questions.

(22). If there is a postscript attached which regulates or modifies the collection of such document of indebtedness, the bailee must comply with the terms and conditions of such an agreement.

CHAPTER II

ARTICLES LOST AND FOUND (*Continued*)—HELPING IN UNLOADING AND RELOADING ANIMAL

INTRODUCTION

THE principle of law, that a person upon finding a lost article may convert the same to his own use, is based solely upon the theory known in Jewish jurisprudence as *abandonment; i. e.*, the loser despaired of ever regaining the article he had lost, and consequently he renounced his right of ownership. In the eyes of the law, it is therefore considered an article which has no owner, a thing in a state of nature, and the one who obtains possession thereof in priority to others acquires title thereto by means of such occupancy.

Abandonment by an owner of a lost article may be either *express* or *implied.*

It is express when the owner was distinctly heard to despair of ever regaining it. It is implied when from the circumstances of the case or from the condition of the lost article it can be inferred that the last proprietor thereof has despaired of it; *e. g.*, either when the article thus found has no particular marks by means of which the owner thereof is able to identify it and thus regain possession; *i. e.*, the article is one of a certain kind making it impossible for one to be distinguished from the other; or when the place wherein the article was found cannot be pointed out with certainty by the owner; when it is a public thoroughfare, where probably the article has been lying for some length of time and has been moved about from place to place by passers-by. Consequently the owner cannot point out to the finder the exact spot where the article was found by him.

When either of the above named conditions exists, it is implied that the owner despaired of ever regaining his property, being aware of the fact that he will be unable to prove satisfactorily to the finder that the article belongs to him. Furthermore he will be unable to prove ownership either by describing any particular marks such article bears, or by pointing out the exact spot wherein it was found. If the above named requisites do not exist, the finder is then bound to proclaim the fact that he has found a lost article in the manner provided for by law. He must surrender the article to the one who either describes all the marks of identification such an article bears, or points out the spot wherein it was found, and thus satisfactorily proves ownership.

Mishnah I. Some articles belong to the finder, and some must be proclaimed. The following belong to the finder: Scattered fruit, scattered coins, small sheaves when found in a public thoroughfare, round cakes of pressed figs, a baker's loaves of bread, strings of fish, pieces of meat, stripes of wool in their natural state, cleansed flax-stalks, and purple wool coming in straps (1). This is the opinion of

---

(1). The articles enumerated in this Mishnah must not be proclaimed because they generally do not

Rabbi Meïr. Rabbi Judah says: "Everything which contains something unusual in it must be proclaimed; *e. g.*, one finds a fig-cake in which there is a fragment of a clay vessel, or a loaf of bread in which there are coins—such articles must be proclaimed" (2). Rabbi

bear any particular marks by means of which the owner is enabled to identify them and prove his ownership; *i. e.*, all articles having the same resemblance cannot be distinguished from the class to which they belong. The owner, therefore, upon losing such articles has despaired of ever regaining them, and consequently they belong to the first fortunate finder.

(2). The opinion of Rabbi Judah is that an article, which bears any mark by means of which it can be identified by the owner, must be proclaimed, even when it is probable that the owner is not aware of the existence of the secret mark of identification. The fragment of clay in the fig-cake or the coins in the loaf of bread, have perhaps fallen therein accidentally, and the owner has no knowledge of the existence of such an occurrence. Nevertheless, when there exists the slightest probability that the owner may be aware of the fact that the articles contain such objects, and consequently will be enabled to regain his property, the finder is bound to proclaim them. This view is sustained by Maimonides, *Laws of Robbery and Lost Articles,* Chapter XV, Law 11.

Simeon ben Eleazar says: "(New) merchandise need not be proclaimed" (3).

Mishnah II. The following articles must be proclaimed by the finder: Fruit in a vessel, or a vessel containing nothing; money in a purse, or a purse containing nothing; heaps of fruit; heaps of coins; three coins one on the top of the other; small sheaves on private ground; homemade loaves of bread; stripes of wool which were already in a mechanic's workshop; and pitchers full of wine or oil (4).

(3). The *Gemara* 23b says that Rabbi Simeon's view refers to new articles which bear no particular marks of identification. The *Gemara* further maintains that when one finds an article he must proclaim it even when it bears no particular marks of identification, for the reason that it must be surrendered by the finder to a person who has a good reputation for veracity, if such person identifies the article from a general impression of its form without stating particular marks. When, however, the article is new and it is evident that it has not been in the owner's possession long enough to enable him to identify it from a mere general impression of its form, it must not be proclaimed. This view is sustained by Alfasi and Maimonides, *Laws of Robbery and Lost Articles*, Chapter XIV, Law 13.

(4). The articles enumerated in this Mishnah

Mishnah III. If one finds pigeons, tied together by their wings, behind a wooden or stone fence, or if such pigeons were placed on the foot-paths of a private field, he must not take them into his possession (5). When one finds an article in a dung-heap, if it be covered, he must not take the same (6); if it be uncovered, he must proclaim it. When one finds an article in a stone-heap or in a wall decayed by age, it belongs to him (7); when one finds

must be proclaimed because they generally bear particular marks whereby they can be identified by their owners.

(5). Pigeons thus found must not be taken by the finder into his care for the purpose of returning them to their owner, because it is probable that the owner has placed them there temporarily, and, as pigeons have no particular marks of identification, the owner will be unable to regain them (*Gemara* 25b).

(6). When the article is well covered by the dung-heap, it is not considered a lost article which the finder is bound to take into his care and proclaim in the manner provided for by law (Rashi to *Gemara* 25b).

(7). Things found in an old wall may be kept by the finder, for they probably belonged, if found in the Holy Land, to the ancient Canaanites, or to some other forgotten nation. This rule of law, therefore, holds true only where in addition to the aged condition of the wall, the condition of the article is such as to something in a wall which is not decayed by age, if it lies in the outer part of the wall, it belongs to him, and if it lies in the inner part of the wall, it belongs to the owner of the wall. If one finds aught in premises which were rented by the owner to various tenants, it belongs to him, even when he finds the same in the middle of the house (8).

indicate that it had been there for a number of years (*Gemara* 26a), and consequently cannot and does not belong to the present owner of such wall. Otherwise the articles found therein belong to the owner.

(8). The articles found in premises which have been occupied by several successive tenants do not belong to the finder when the last occupant of the premises is an Israelite, because the presumption is that the articles thus found belong to the last occupant of the premises. The ruling of this Mishnah, therefore, must be interpreted that the last occupant of the premises was a non-Israelite, who is not entitled by law to have a lost article restored to him (*Gemara* 26a).

The last named rule of law is based upon the following reasoning. Civil law, the product of justice and of natural principles of humanity, nevertheless owes its origin to principles of social life. Many laws are made for mutual and reciprocal advantages of society. Laws, therefore, cannot be made for a single individual only. An individual, associating with

Mishnah IV. If one finds something in a store, it belongs to him (9); if, however, he finds it between the counter and the storekeeper's seat, it belongs to the storekeeper.

people not bound to observe any set principles of law, cannot, with justice, be compelled to observe laws of justice in his dealings with them, as his equitable and just dealings will not be reciprocated.

As is the case with an individual, so it is with an entire nation. One nation cannot be singled out from the entire world and be forced to observe such equitable principles of civil law as the Jews have, in dealing with other nations, and at the same time the other nations refusing to reciprocate.

The barbarian non-Israelite, therefore, who could not be prevailed upon to observe law and order, was not to be benefited by the Jewish civil laws, framed to regulate a stable and orderly society, as he is not a "neighbor" or "brother" in the sense of reciprocity.

The Mosaic Law provides for the restoration of a lost article to its owner if a "brother" (Deut. xxii, 1), but not if a non-Israelite (*Baba Kama* 113b), because the latter would not reciprocate. It was, therefore, held that if one finds aught in a city, the majority of whose inhabitants are non-Israelites, he is not bound to restore it to its owner (*Gemara* 24a), even when he is certain that an Israelite has lost it, because the owner, presuming that a non-Israelite has found it, despaired of ever regaining it (*Tosafot* to *l. c.*). The Persian law commanded the surrender of all lost articles to the king (*Gemara* 28b).

If one finds something in front of a money-changer's table, it belongs to him (9); if, however, he finds it between the stool (whereon the money-changer displays his money) and the money-changer, it belongs to the latter (10). If one buys fruit from his neighbor,

Furthermore, a lost article was not to be restored to a non-Israelite, not only because the latter would not reciprocate, but also for the further reason that such restoration would be a hazardous undertaking. The law of Hammurabi, for instance, made certain acts connected with "articles lost and found" a ground for capital punishment, thus: "If the owner of lost property has not brought witnesses identifying his lost property; if he has lied, or stirred up strife, he shall be put to death" (Johns, *Oldest Code of Laws*, Sect. 11). The loser, the finder, and an intermediate person was put to death in certain stages of the search for the missing article (*l. c.*, Sects. 9–13).

(9). Articles found in a store or in front of a money-changer's stand belong to the finder, because they were presumably lost by a customer, and, as these places partake the nature of a public place, the doctrine of *abandonment* is applicable to such lost articles. If, however, the articles found in such places bear particular marks of identification, they must be proclaimed (Rashi to *Gemara* 26b).

(10). The finder must surrender the articles, found in the places mentioned in the text, to the proprietor even when they bear no particular marks or if the fruit has been sent to him, and he finds coins therein, they belong to him (11). If, however, the coins thus found were tied up in a package, he must proclaim them (12).

of identification. Such places, being exclusively occupied by the proprietor, the articles found therein were presumably lost by him.

(11). The present owner of the fruit is permitted to convert the coins thus found to his own use only when he has bought it from a merchant who generally buys fruit from various persons. In such a case it cannot be ascertained to whom the coins have belonged, and their owner despaired of ever regaining them because they cannot be identified. When, however, one buys fruit from a peasant, who has not employed workmen in threshing his grain, the coins must then be surrendered to the peasant (*Gemara* 27a).

(12). Money found in a package or in a purse must be proclaimed because it can be identified by the owner either by giving a full and detailed description of the package or the purse, or by giving the exact amount of money that was found therein. The reason scattered coins are not to be proclaimed (Mishnah I, *supra*) is that it is uncertain whether all the coins were lost by the owner at one and the same time and in one and the same place. The owner, not knowing whether or not the entire sum of money he lost was found by one man in one place, consequently despaired of it, as he will be unable to identify it either by giving the exact amount of the money found or by pointing out the exact spot wherein the money

Mishnah V. A garment was also included (in the verse: "And in like manner shalt thou do with every lost article of thy brother, which may have been lost to him, and which thou hast found; thou shalt not withdraw thyself therefrom," Deut. xxii, 3), why then was it mentioned separately in said verse ("and in like manner shalt thou do with his garment")? In order to compare every lost article (with regard to its restoration) to a garment, and to point out that just as a garment must be proclaimed by the finder because it bears marks of identification and there is one to claim ownership (13), so

---

was found. When, however, the coins are found in a heap (Mishnah II, *supra*) or in a package, they must be proclaimed and surrendered to the person who is able either to give the exact amount of the money found, or to point out the exact spot where it was found, even when the package bears no particular marks of identification. The giving of the exact amount of money (*Gemara* 23b), and the pointing out of the exact spot (*Gemara* 22b), are valid identifications.

(13). The mere fact that an article bears marks of identification is in itself not sufficient to warrant a proclamation. The finder is not bound to proclaim an article even when it does bear marks of identificamust every article be proclaimed, if it has marks of identification and there is one to claim ownership.

Mishnah VI. For how long a period is the finder bound to proclaim a lost article? Until the neighbors become aware of the fact (14); this is the opinion of Rabbi Meïr. Rabbi Judah says: "At all the three festivals (15), and for seven days after the last festival,

---

tion, if the owner was expressly heard to state that he had despaired of ever regaining it. This explanation of the text of the Mishnah is upheld by Rashi (to *Gemara* 27a) and Maimonides, *Commentary on the Mishnah.*

(14). The neighbors of the place where such articles were found; it is most probable that they were lost by one of them (*Gemara* 28a).

(15). Namely, Passover, the Feast of Weeks and the Feast of Tabernacles, when all Jews were to appear in the Holy Temple, and for many years after the destruction of the Temple, the Jews were accustomed to visit on the above named festivals the place where the Temple had stood. After the expiration of the third holiday following the proclamation of a lost article, the finder must remain in Jerusalem for seven days in order that every one may have a chance to go home, look over his belongings and ascertain whether he has lost anything and return to Jerusalem. An additional day is given him for communicating in order to allow the loser three days in which to reach home, three days for the return, and one day for the proclamation."

Mishnah VII. One (claiming to be owner of a lost article) states the object he has lost, but is unable to describe its marks of identification, it shall not be delivered to him. If the claimant is reputed to be a deceiver, the lost article shall not be delivered to him even when he does describe its marks of identification, as it is said (Deut. xxii, 2): "And it (the lost article) shall remain with thee until thy *brother* inquires after it," which means, until you investigate your brother whether he is a deceiver or not (*i. e.*, whether he is your *brother* or a deceiver).

If a man finds an animal that earns its keep by its work, he is compelled to use it for work and feed it (16); but if he finds an animal that

---

with the finder. Rabbi Judah's view is sustained by Alfasi and Maimonides, *Laws of Lost Articles*, Chapter XIII, Law 8.

(16). The finder is not bound by law to do so *ad infinitum*, but for a certain limited time only; all depending upon the nature of the animal. The highest period prescribed by law in such cases is not longer than one year (*Gemara* 28b).

does not earn its keep by its labor, he must sell it (and keep the proceeds for the owner); as it is said (*l. c.*): "And thou shalt restore it to him (the owner)," which means, deliberate how the restoration shall be made (17). What shall be done with the money (realized from such sale)? Rabbi Tarfon says: "He may use it, and therefore he is responsible if it gets lost" (18). Rabbi Akiba says: "He may not use it, and therefore he is not responsible in case of loss."

---

(17). When one finds an animal that does not earn its keep by its work, he is not permitted to take care of it and feed it until the owner demands the same. He must sell the animal and hold the money for the owner, as the expenditures for feed may equal to or even exceed the value of the animal.

According to Rashi's explanation of the text of the *Gemara* 28b, such sale must be effected under the supervision of the court. *Tosafot*, however, and many other later jurists hold that it is not at all necessary to have the court's supervision. They, furthermore, hold that the finder himself may determine the value of the animal and keep it, on the obvious ground that the court cannot suspect the finder of undervaluing the animal. Had he been dishonest, he could have concealed the fact of finding the animal, and thus be benefited by its entire value.

(18). In this case the finder becomes liable as if he were a borrower. (*Vide* Chapter VII, *Mishnah* VIII.)

Mishnah VIII. If one finds books (and holds them in charge for the owner), he must read them once in thirty days. If unable to read, he must roll them over (19) once in thirty days (in order to air them). He is not, however, permitted to make use of them for studying purposes. Furthermore, no one else is allowed to read with him (at one and the same time). If one finds a garment, he

It is not at all vital that he makes actual use of the money in order to be held liable as a borrower. Since he is privileged by law to make use of the money, he is considered a borrower from the moment the sale is effected, whether he actually avails himself of such privilege or not (*Gemara* 29a).

The opinion of Rabbi Tarfon is the prevailing law. His view, however, holds true only where the money in the custody of the finder was realized from the sale of a lost article, and the privilege of using it is given him by law in consideration of the trouble he had in effecting the sale. When one, however, finds ready money, he is not allowed to make any use thereof. (View of Rab Huna, *Gemara* 29b; sustained by Alfasi and Maimonides, *Laws of Robbery and Lost Articles*, Chapter XIII, Law 18.)

(19). The books in those days were made in the form of scrolls.

must shake it once in thirty days; he may spread it (on his bed or table, or make any other use thereof) only when it is for its need, but he may not do so when it is to his own honor or for his own need. He may make only such use of silver or copper vessels as is necessary for their need (that they might not become rusty). He must not, however, use them so often or so much that they become worn out. He is not allowed to make any use whatever of utensils of gold or of glassware until Elijah will come (20). If one finds a sack or a big basket, or any other article which is unbecoming for him to carry, he is not bound by law to take it (into his care for the purpose of making an effort to return the same to the owner) (21).

Mishnah IX. What is to be considered a lost article (22)? If one finds an ass or a cow grazing along the highway, it is not to be considered as lost; if he finds an ass with his gear hanging upside down, or a cow running among vineyards, it is to be considered as lost. If the finder has returned the animal and it runs away again, even when this occurs four or five times, he is still bound to return it on each occasion; as it is said (Deut. xxii, 1): "Thou shalt surely bring them back again unto thy brother" (23).

---

(20). The finder is not permitted to make any use whatever of the vessels made out of the material mentioned in the text, because they do not become rusty or worn out even when not used at all.

(21). This rule of law is sustained on the theory that one is not bound by law to do for others that which he would not do for himself.

(22). Under what circumstances is a man bound by law to take an article into his possession, and consider it as lost in order to make an effort of returning the same? When the condition of the article or of the place wherein it was found is such as to indicate that the owner would never intentionally have placed it there. This is the criterion by which a man, upon seeing a certain article or animal, is to determine whether or not he is bound by law to take it into his possession, take the necessary care thereof, and make all efforts possible to restore it to its owner.

(23). The text in the Pentateuch (*l. c.*) is *hosheb*, which is the infinitive absolute form of the Hebrew verb *to return*, and *theshibem*, which is the future form of the same. The Mishnaic theory in every case is, that the infinitive absolute of a verb with the finite form thereof is used not only to express emphasis, If the finder neglected his usual work (in taking charge of the lost article) to the extent of a *sela*, he cannot say to the owner: "Give me a *sela;*" but the latter has to pay him as he would pay an (idle) laborer (24). If there is a court of justice (in the neighborhood where the article is found) (25), the finder may bring it before such court for adjudication (26);

---

that it must be done without fail, but that the repetition also indicates that the thing ordered to be done must be done to its perfection, even when it is to be repeated several times. In the case of a lost article, it cannot be called a complete restoration unless the lost article is securely restored to the possession of the owner. According to the Law of the Scripture, therefore, the finder must return the lost article as many times as may be necessary.

(24). We inquire how much less a laborer would take when required to do work of this nature (to take charge of a lost article) than for his usual work (*Gemara* 31b; Rashi *a. l.*).

(25). In the Jewish procedure, any body of three or more laymen constituted a court of common men.

(26). The finder says to such court: " The loss of my time is so much and so much, and I restore this lost article on the express condition that I shall receive full compensation for the loss of my time." If the court, upon due deliberation of the facts of the case, awards him the sum demanded, the owner must abide by such decision.

if there is no such court before which to bring it, his own time is then preferable.

Mishnah X. If one finds an animal in a stable, he is not bound to concern himself with it (27); if it is in a public thoroughfare, he is compelled to take it into his care. If it is in a cemetery (and the finder is a Priest, who is prohibited by law from entering therein), he is not allowed to enter and take it. If in the last named instance, the father of the Priest told him to defile himself, or if in any other instance a father tells his son not to return a lost article, the former must not be obeyed.

If a person unloaded or reloaded an animal, and he did so over and over again, even four or five times, he is still bound to do so again (28); as it is said (Ex. xxiii, 5): "Thou shalt surely help him" (29). If the owner of the animal went and sat down, and said to the passer-by: "Since you are bound by the Law of Moses to assist me, do so (without my help)," the latter is not compelled to do anything at all; as it is said (*l. c.*): "With him (the owner)." If, however, the owner of the animal is an old man or sickly, the passer-by is obliged to render the necessary assistance (even without the help of the owner). The biblical law requires a man to help in unloading an animal, but not in reloading it (30). Rabbi Simeon says: "Reloading, too" (31). Rabbi José the Galilean says: "If the animal was overburdened by its owner, one is not bound to render any assistance, as it is said (*l. c.*): 'Under *its* burden' which implies, that it must be such a burden which the animal is able to carry" (32).

---

(27). Although the stable is unlocked and the animal is not well guarded therein, the finder is not bound to take it into his care, because the mere fact that it is in a stable indicates that it is not lost (*Gemara* 32a).

(28). This rule of law interprets the commandment of the Torah (Ex. xxiii, 5): "If thou see the ass of him that hateth thee lying under its burden and wouldst forbear to help him, thou shalt surely help him."

---

(29). The text in the Pentateuch reads *asob, to help; ta'sob, thou shalt help.* For the use of an infinitive with a finite form of a verb, *vide* note 23, *supra.*

(30). One is compelled by the law of the Pentateuch to help unload the animal gratuitously, and help reload it for remuneration only (*Gemara* 32a). The anonymous tanna is of the opinion that the Torah, in commanding one to help his neighbor relieve his animal of a burden, has reference to a case where the *animal* suffers, but that such commandment does not impose upon one to render relief to the *owner* of the animal. In other words, the Pentateuch in this particular case provides for the benefit of the animal and not for the benefit of the owner. In a case of reloading, therefore, where the animal does not suffer, the passer-by is not compelled by the aforesaid com-

mandment to help reload it gratuitously in order to relieve the owner from his suffering; but in the case of unloading where the animal does suffer, the passer-by is bound to help unloading without remuneration, in order to relieve the animal.

(31). Rabbi Simeon is of the opinion that even reloading must be done gratuitously, because the law of the Pentateuch applies to the relieving of the owner as well as to that of the animal. His view does not prevail (Maimonides, *Commentary on the Mishnah*).

(32). The opinion of this tanna, as deduced by him from the Pentateuch, is that a man is bound by law to help his neighbor in unloading his animal only when, through no fault of the owner, it accidentally happens for some reason or other that the animal becomes disabled from continuing to carry its burden. When, however, the disability is entirely caused by the recklessness or carelessness of the owner, in that he put too heavy a burden upon the animal, one is not compelled by law to help him even unload it gratuitously. This view is not supported by weight of authority: the prevailing opinion is that unloading must be helped gratuitously under all circumstances (Alfasi; Maimonides, *Commentary on the Mishnah*).

Mishnah XI. If a man's own lost article and his father's are to be attended to, his own has the precedence; his own lost article and his teacher's, his own has the precedence (33); his father's lost article and his teacher's, his teacher's has the precedence, because his father brought him into this world, but his teacher who has taught him knowledge has brought him thereby into the world to come (34); if, however, his father is an educated man, he has the precedence. If his father and his teacher were each carrying his burden, he shall assist his teacher first (in helping him take off his burden), and thereafter assist his father. If his father and his teacher were taken into captivity, he shall ransom his teacher first and then his father; if, however, his father is an educated man, he shall ransom his father first and then his teacher.

---

(33). When there is not sufficient time for him to save both of the lost articles, then his own has preference.

(34). This rule of law, however, holds true only when the disciple has gained most of his knowledge, in the subject he is versed in, from such teacher, but not otherwise (*Gemara* 33a; Maimonides, *Laws of Lost Articles*, Chapter XII, Law 2).

CHAPTER III

BAILMENTS

Mishnah I. One bails an animal or vessels with his neighbor (who is to guard the same gratuitously), and such bailment is stolen or lost (while in the possession of the bailee). If the bailee pays for the bailment (1) and does not want to take the prescribed oath (as it is said that a gratuitous bailee may, in cases of theft or loss, take an oath and is then exempt from liability) (2), and thereafter the thief is found, the latter must pay double the value of the article stolen (if he did not dispose of the same and is ready to surrender the possession thereof to the owner) If the thief has slaughtered the animal or sold the article, he must pay its value four or fivefold (3). To whom does he have to pay the penalty? To him who has kept the bailment (4). If the bailee took the prescribed oath and did not pay, and thereafter the thief is found, the latter must pay double the value of the article stolen, and if he slaughtered the animal or sold the article, he must pay its value four or fivefold. To whom does he then have to pay the penalty? To the owner of the bailment (5).

---

(1). It is not essential that the bailee shall make actual payment to the bailor in order that he may be subrogated to the rights of the bailor and become entitled to the penalty paid by the thief. If he promises to pay for the bailment it is sufficient (*Gemara* 34a; Alfasi; Maimonides, *Laws of Loan and Bailment*, Chapter VIII, Law 1). The bailee upon making such promise to the bailor is unable to retract, because his promise is supported by a valid consideration moving from the bailor, in that the latter agrees that the former shall not have to take the oath imposed upon him by the Law of Moses. Both parties to the agreement are, therefore, bound and neither may retract (*Tosafot* to *Gemara* 34b; Rabbenu Asher).

---

(2). For the law regarding the liability of a gratuitous bailee, *vide* Chapter VII, Mishnah VIII, *infra*.

(3). The thief must pay fourfold in case of a lamb, and fivefold in case of an ox. The reason the penalty is greater in case of an ox is that the owner thereof has been deprived of its use while it was in the thief's possession, which is not true with a lamb as it is not used for work.

(4). When the theft took place the bailee had only a qualified possession of the bailment. Still the thief must pay the penalty imposed upon him by law, because the bailee's possession of the bailment is deemed in law to be the possession of the bailor. Hence, when it was stolen from the bailee, theft was thereby committed. The thief must, therefore, pay the penalty imposed upon him in cases of

Mishnah II. One hires a cow from his

theft, to the bailee, when the latter elects to pay, or promises to pay, for the bailment, because by reason of such payment or promise he is subrogated to the rights of the bailor and becomes entitled to the penalty.

(5). The thief must pay the penalty in this case to the bailor because, as stated hereinbefore, the bailee's possession is in law deemed to be the possession of the bailor also. The law regarding theft is, therefore, applicable in such cases to the bailor as well as to the bailee, and either party may institute an action against the thief to recover the penalty as well as the chattel.

In the eyes of the law, the oath taken by the bailee is in lieu of payment for the bailment which was either stolen or lost. Such oath, however, according to this anonymous opinion, has the effect of exonerating him from liability, but does not suffice to vest title in him to the bailment and to subrogate him to the rights of the bailor.

neighbor, and loans it to some one else (6). (While in the borrower's possession), the cow

(6). It is a well established principle in Jewish law, that a bailee is liable in every case if he delegates the trust reposed in him by the bailor. (View of Rabbi Johanan *Gemara* 36a.) There is, however, a diversity of opinion as to the true reason underlying such principle of law. Abayi (*l. c.*) says that the reason a bailee is liable in such a case is, that the bailor may claim that he is unwilling to have his property entrusted to anybody else but the bailee. When the bailee, therefore, delegates the trust reposed in him by the bailor, he is guilty of a tort and is consequently liable even when the bailment, while in the bailee's possession, has been destroyed or taken away by a superior force or an unavoidable occurrence. If it is proven, however, by the bailee that the bailor previous thereto was accustomed to entrust his property in the custody of such sub-bailee, he is not liable (*l.c.*). According to this view, then, the Mishnah now under discussion must be explained that the hirer has loaned the cow in question with the consent of the owner. Otherwise, the hirer would be held liable even when it is proven by him that the cow had died a natural death, because the hirer having delegated his trust without the owner's consent, would be guilty of a tort and would then he held liable in every case (*l. c.*).

Rabba (*Gemara* 36b) is of the opinion that the reason a bailee is liable when he delegates his trust is that the agreement between the bailor and the bailee, consenting that the latter be exempt from liability by taking the biblical oath where such is applicable, does dies a natural death; the hirer has then to take an oath that it died a natural death, and the borrower (who is liable in such cases) (7), must pay the value of the cow to the hirer (8).

not, unless stipulated to the contrary, extend beyond the person of the bailee. (This view is upheld by Alfasi, Rabbenu Asher and many other jurists.) When no necessity has arisen for the sub-bailee to take an oath, as for instance when there are witnesses to testify to the effect that he was not guilty of negligence, and that the circumstance causing the loss or the theft of the animal was such as would exonerate the bailee from liability, or when the bailee himself is capable of taking an oath to substantiate this, having been an eyewitness to the occurrence, then the bailee is not liable (*Tosafot* to 36b; *Mordecai*, Sect. 270); since according to Rabba's view the delegation of a bailee's trust in and for itself does not constitute a tort. In accordance with the latter view, therefore, the decision of this Mishnah can be upheld on the theory that the hirer has witnessed the accident. For, from the fact that an oath is imposed upon the hirer to substantiate the statement that the cow has died a natural death while in the possession of the sub-bailee, it is evident that he was then present. Otherwise no oath could be imposed upon him if the statement be based upon mere hearsay.

(7). As to the extent of liability of a hirer and that of a borrower, *vide* Mishnah VIII, Chapter VII, *infra*.

(8). This tanna is of the opinion that the owner can obtain no recovery from the borrower because there

Said Rabbi José: "How (can this be)? Shall this man do business with his neighbor's cow? The cow (or the value thereof) must, therefore, be returned to the owner" (9).

was no contractual relation existing between the parties. According to Abayi's view, this tanna's decision means that the bailor has not expressly authorized the hirer to effect such loan, but that he simply said to the hirer: "You may do so, if you so desire" (*Gemara* 36a). A consent expressed in the form as aforesaid, is construed by the court to mean that the bailor consented only to exonerate thereby the hirer from being liable in every case as a tort-feasor, but that he did not intend thereby to sever the contractual relation already existing between him and the hirer and make a new contract with the sub-bailee.

The only recovery, therefore, the bailor is entitled to in a case like the one under discussion is against the hirer, and not against the sub-bailee, as there was no contractual relation existing between the bailor and the sub-bailee. The bailor can compel the hirer, in the capacity of a bailee for hire, either to take an oath that the animal died a natural death, or else pay for it, while the hirer may institute an action against the borrower.

(9). According to Abayi's view, Rabbi José's opinion rests upon the theory, that as long as the hirer has effected the loan in question with the owner's consent, there was thereby a new agreement entered into between the bailor and the sub-bailee, and a contractual relation, therefore, existed between such parties.

Mishnah III. If one says to two persons: "I have robbed one of you of one hundred *zuz*, but I do not know who it is;" or he says to them: "The father of one of you has deposited one hundred *zuz* with me, but I do not know whose father," he must then pay one hundred *zuz* to one and one hundred *zuz* to the other, as he himself has admitted the liability (10).

Rabba's view is that Rabbi José is of the opinion that when the hirer has loaned the cow in question to the borrower, the law presumes that he has done so in the capacity of an agent on behalf of the bailor, since the liability of the sub-bailee, as a borrower, is greater than that of the bailee, who is only a hirer. A quasi contractual relation is, therefore, existing between the bailor and the sub-bailee (Rabbenu Asher).

(10). This decision cannot be sustained on legal grounds, for it is well established that the plaintiff has the burden of proving his case by a preponderance of evidence in every instance. In the case under discussion, neither of the plaintiffs is able to prove his case, because the cause of action has arisen solely by virtue of the admission made by the defendant, but he claims that he is uncertain to whom he owes the sum he admitted. The plaintiffs, therefore, not being in a position to prove their case, would at law be unable to obtain a recovery, and the defendant would be held liable in the sum of one hundred *zuz* only (Alfasi).

Mishnah IV. If two men have deposited money with one person, one has deposited one hundred *zuz* and the other two hundred *zuz*, and thereafter one says: "The two hundred *zuz* are mine," and the other one says: "The

---

This decision, however, can be sustained on equitable principles (*Gemara* 37a; Maimonides, *Laws of Robbery and Lost Articles*, Chapter IV, Law 10). As to the conception of equity in Jewish jurisprudence, *vide* note 11 to Chapter IV, *infra.*

If, however, before the admission was made by the defendant, both plaintiffs had claimed that each was robbed of the sum of one hundred *zuz*, or that each of their fathers had deposited such sum with the defendant, then both would be entitled to a recovery by taking an oath to substantiate their claims. For the plaintiffs were guilty of no negligence whatever in the premises, but it was the wrongful act of the defendant in the first case, and his negligence in the second case in that he did not take any precaution to be able to ascertain the party that deposited with him the sum he admits, that has caused the existing doubt. He must, therefore, bear the consequences of his wrongful act or that of his negligence, because the law says that when, from the status of facts, it becomes inevitable that one of the parties to a controversy must necessarily suffer some loss, it is the one who was guilty of a wrong or of negligence that must suffer the loss (Alfasi; Maimonides, *Commentary on the Mishnah*).

two hundred *zuz* are mine," the bailee shall give one hundred *zuz* to one and one hundred *zuz* to the other, and the balance shall remain with him until Elijah will come (11). Said Rabbi José: "If so (is your decision), what will the deceiver lose thereby? The whole amount shall, therefore, remain with him until Elijah will come" (12).

(11). Maimonides interprets the text in the *Gemara* 37a that both bailors have deposited their respective sums of money in one package, otherwise the bailee would be held liable as he was guilty of negligence in that he did not write the names of the bailors on their respective packages, or in that he did not take any other means by which he could ascertain the owner of each package.

Rashi interprets the above text of the *Gemara* to mean that both bailors have deposited their respective sums of money at one and the same time and in one another's presence. The bailee may, therefore, say to the bailors: "If you have trusted one another and have not taken the necessary precaution in order to prevent fraudulent claims, why should I have mistrusted or suspected you and take precautions for the purpose of preventing fraudulent claims that could have possibly arisen or been made by either one of you?"

(12). Rabbi José's opinion is that the deceiver, not being able to obtain the sum actually deposited by him, may in course of time admit the truth. The de-

Mishnah V. The same is the case with two vessels (when deposited by two bailors), one of which is worth one hundred *zuz*, and the other is worth two hundred *zuz*. One of the bailors says: "The bigger vessel is mine," and the other one says: "The bigger vessel is mine." The bailee shall then give the smaller vessel to one of them, and out of (the money realized from the sale of) the bigger vessel, he shall give the value of the smaller one to the other, and the balance shall remain with him until Elijah will come (13). Said Rabbi José: "If so (is your decision), what loss will the deceiver sustain thereby? Both vessels shall,

---

cision of the anonymous tanna, however, is the prevailing law (Maimonides, *Laws of Robbery and Lost Articles*, Chapter IV, Law 10).

(13). The reason why the principle of law involved in the previous Mishnah is repeated in the present Mishnah is explained in the *Gemara* 37b. It is to point out that even in the case where the controversy between the two bailors relates to two vessels, and where the owner of the better vessel will eventually sustain some loss by such sale, as the sale will not realize the amount actually paid by him for the vessel, still the sages maintain their view that it must be sold, and that the case be disposed of as stated in the text therefore, remain with the bailee until Elijah will come."

Mishnah VI. When one stores fruit with his neighbor, even if it may be destroyed (by decay or mice), the bailee must not dispose of the same (14). Rabban Simeon ben Gamaliel says: "He must sell it under the supervision of the court (in the absence of the bailor), because he is in such a case considered as the one who restores a lost article to its owner."

Mishnah VII. When one stores fruit with his neighbor (and the bailee stores the same with his own fruit, so that he is unable to ascertain how much of the bailment became decreased by reason of shrinkage and decay or destroyed by mice), the bailee may deduct decreases as follows: For wheat and rice, nine half *cabim* to one *kor* (180 *cabim*); for barley and millet, nine *cabim* to one *kor;* and for spelt and linseed, three *seahs* (18 *cabim*) to one *kor*. All depends upon the measure and the length of time such fruit has been stored (15). Said Rabbi Johanan ben Nuri: "What do the mice care? Don't they consume the same amount whether from much or little? The bailee may, therefore, deduct a decrease of one *kor* only" (16). Rabbi Judah says: "If there was a large quantity stored, he may deduct no decreases whatever, because in a case like this, the measure of the fruit increases" (17).

---

(14). This rule of law, however, holds true only where the loss of the fruit stored does not exceed the limit stated in the following Mishnah (*Gemara* 38a). The anonymous view is the prevailing law (Maimonides, *Laws of Loan and Bailment*, Chapter VII, Law 1).

Mishnah VIII. The bailee may deduct one-sixth for outage of wine; Rabbi Judah says: "One-fifth only." He may deduct three *lugim* of oil to one hundred *lugim:* a *lug* and one-half for lees, and a *lug* and one-half for the absorption by the vessel (18). If the oil stored was purified, he cannot deduct any outage for lees; if the vessels (wherein it was kept) were old, he cannot deduct for absorption. Rabbi Judah says: "If one sells purified oil to his neighbor, to be delivered within the period of one year in small quantities, the buyer undertakes to bear the outage of a *lug* and one-half for lees to each and every one hundred *lugim* of oil" (19).

---

(15). The bailee may deduct the measure stated herein for each and every *kor* annually (*Gemara* 40a).

(16). This tanna is of the opinion that the bailee may account annually for the decrease of one *kor* only, and not for each and every *kor* stored. His view does not prevail.

(17). Grain was generally stored in the summer and returned in the winter months. The measure of the grain thus stored was, therefore, increased by reason of the moisture which prevailed in the winter season.

---

(18). The clay of which the vessels were made in those days was unimproved and unsuitable for the purpose of keeping any liquid therein.

(19). Rabbi Judah maintains that when two parties enter into an agreement, whereby it is stipulated that one shall sell to the other a certain measure of purified oil to be delivered sometime in the future, the terms of such an agreement cannot be construed to mean that the vendor must *deliver* purified oil of the measure stipulated, and bear the outage for lees of such oil. The terms simply import an obligation upon the part of the vendor that he must deliver the oil in a purified state, *i. e.*, that he must cleanse the oil of its lees, but that the vendee must bear the outage. This Rabbi being of the opinion that, unless expressly stipulated to the contrary, it is the vendee who generally undertakes to bear the outage of lees and not the vendor.

Mishnah IX. One stores a cask with his neighbor, and does not assign any particular place wherein it shall be kept. Thereafter the bailee removed such vessel (from the place where it was originally placed by him soon after such an agreement of bailment had been entered into between the parties) and it was broken accidentally. If this happened while it was yet in his hand and the removal was effected by him for his own benefit or advantage, he is liable; but if the removal was effected by him for the benefit of the cask (in order to remove it to a safer place), he is not liable. If it was broken after he had replaced it, he is not liable whether such removal was made to his own advantage or to that of the vessel (20). If the

---

The prevailing view, however, is that the terms of the agreement hereinbefore mentioned do import an understanding between the contracting parties that the vendor shall bear the outage of lees and shall *deliver purified oil* of the entire measure stipulated (Alfasi and Maimonides).

(20). A logical interpretation of this Mishnah would seem to be that when it is said that the bailee removed the cask to *his own advantage*, it is meant thereby that bailor (at the time the agreement of such bailment was made) did assign a particular place wherein the cask should be kept by

the bailee desired to make temporary use of the *place* wherein the bailment was kept by him. Such a construction of the text would entirely eliminate the question of conversion from the first case stated in the text, and the various rules of law laid down in the Mishnah could be reconciled without any difficulty. Thus: when no particular place is assigned by the bailor, and the bailee thereafter removes the bailment and it gets broken while it is being removed, he is liable if such removal was effected by him for the reason that he wanted to make use of the place where the bailment was kept. By so doing he has violated an implied trust reposed in him by the bailor that he should keep the bailment in a place where it is most secure, and not where it is most convenient for the bailee. But if the accident happens after the replacement of the vessel, then the bailee is not liable in any event because he is then restored to his original position of an ordinary bailee and is not liable in cases of a simple accident.

When the bailor, however, has assigned a particular place for his bailment, and the bailee notwithstanding removes it for the reason that he wants to make temporary use of the place, he is liable even when the vessel was broken after he had replaced it. He is then guilty of conversion and is considered as a tort-feasor in that he has violated an express trust reposed in him by the bailor that the bailment the bailee and the latter removed it from such place and it was broken, if the removal was made for his own benefit, he is lia-

should be kept in the particular place assigned for that purpose.

The *Gemara* 41a, however, interprets the text of this Mishnah to mean that the bailee has effected such removal because he wanted to make temporary use of the *cask*, and therefore Rabbi Johanan (*l. c.*) contends that the two cases stated in the text cannot be reconciled on strict principle. He sustains the view of Rabbi Akiba (*Baba Kama* 118b) that if one steals a lamb from the flock belonging to his neighbor, and thereafter returns such lamb to the place wherefrom it was stolen, but does not notify the owner of such return, and thereafter an accident to the lamb occurs, he is liable. A thief is not exonerated from being liable as a converter of the property stolen unless he makes restoration thereof and gives notice of such restoration to the owner.

In the first case as presented in this Mishnah where the bailee takes the article stored with him for the purpose of making personal use thereof, he is in the eyes of the law considered a tort-feasor, guilty of conversion. When, therefore, he returns the article without notifying the bailor of such return, he should be held liable even when the accident to the bailment has happened after he had restored it to its place, because he did not notify the owner of such restoration. His view is sustained by Alfasi; Maimonides, *Commentary on the Mishnah.*

ble whether this happened while yet in his hand or after he had replaced it; when the removal was made for the benefit of the cask, he is not liable (21).

Mishnah X. If one deposits money with his neighbor (for safe-keeping), and the bailee ties it up in a package and carries it over his shoulder (22), or he entrusts it to his minor son

(21). When the removal is effected by the bailee for the safety of the vessel and it breaks accidentally, he is not liable even in a case where the bailor did assign a particular place wherein the bailment should be kept, as it is implied as a matter of law that the bailor has assigned that particular place because he thought that such place would be safest. If for some reason or another the place so assigned by the bailor becomes unsafe, and the bailee consequently removes it to a safer place and it breaks accidentally either after he has replaced it or while removing it, he is not liable, because there is an implied consent on the part of the bailor to have it removed in such a case.

(22). When money is deposited with a bailee for safe-keeping, the highest degree of care is imposed upon him, because money is more apt of being stolen or lost than any ordinary article. If, therefore, the bailee carries the money with him, he must keep it in his hand; if he keeps the money in his house, he is obliged to deposit it in the safest place in his premises (*Gemara* 42a).

or daughter (23), or he does not lock it up safely, he is liable if an accident occurs, because he did not take the precaution imposed by law upon bailees. But if he took the precaution required by law, he is not liable.

Mishnah XI. When one deposits money with a money-changer (for safe-keeping), the latter is not allowed to make use of the same if it is tied up in a package (24), and therefore if

(23). If a bailee entrusts the money deposited with him to his children who are of age or to his wife and an accident to such money happens while in their custody, he is not liable if it was carefully kept by them. The bailee is not guilty of having delegated his trust in such a case, because it is implied as a matter of law that whenever one deposits aught with his neighbor, he does so with the express understanding that the bailee, in his absence from his house, may entrust such bailment to any member of his family who is capable of taking care of it (*Gemara* 36a *et. seq.*). If, however, the bailment is not carefully kept by them and by reason of such negligence the bailment is either stolen or lost, the bailee is liable to the bailor in damages, if such sub-bailees are incapable of paying (*Tosafot* to *Gemara* 42b).

(24). When money is deposited with a bailee, a preliminary question arises whether it is a special deposit or a loan. When money is deposited with a private person, he may not use it whether it is loose or sealed, because it was presumed by the bailor that the bailee it gets lost, he is not responsible (25); if the money is loose, he may use it, and therefore if

would not make use of it but would keep it in a safe place. But when one deposits money with a money-changer who has constant and immediate use and need of money in his business, it is presumed that the bailor has deposited such money with the express intention of permitting the bailee to make use of the same whenever he would so desire, and the latter then becomes liable in every case in the capacity of a debtor. When, however, the money so deposited is contained in a sealed or privately knotted bag, this indicates the intention of the bailor that he has not consented to the money-changer's making use of the same.

(25). When the bailee is not permitted by law to make use of the money deposited with him, he is considered a gratuitous bailee, if he does not receive any extra compensation from the bailor for the taking care of the same. In this instance he is not liable in cases of theft or loss if it was not caused by reason of his gross neglect. But when he is permitted by law to make use of the money, he is then considered a bailee for hire by reason of such privilege, and he is liable even in cases of ordinary neglect of duty whether he actually avails himself of the privilege or not (*Gemara* 43a; Maimonides, *Laws of Loan and Bailment*, Chapter VII, Law 10). If, however, the bailee does make actual use of the money so deposited with him, or any part thereof, he is then considered a debtor and is liable in every case (Alfasi; Maimonides, *Commentary on the Mishnah*).

it gets lost, he is responsible. When money is deposited with a private person, he may not use it whether it is sealed in a package or loose, and therefore he is not responsible in case it gets lost. A storekeeper is considered (in this respect) like a private person; such is the opinion of Rabbi Meïr. Rabbi Judah says: "A storekeeper is to be considered like a money-changer" (26).

Mishnah XII. When a bailee converts a bailment to his own use, the School of Shammai says: "He suffers the disadvantage of loss and gain (*i. e.*, he must pay according to the original value of the bailment in case of depreciation, or according to the present value in case of a rise in value);" the School of Hillel says: "(He must pay) as at the time the conversion took place;" Rabbi Akiba says: "(He must pay) as at the time he is summoned to court" (27).

(26). Rabbi Judah's view is the prevailing law (Maimonides, *Laws of Loan and Bailment*, Chapter VII, Law 6).

(27). The *Gemara* 43b says that the diversity of opinion in this Mishnah refers to a case where the value of the article converted has increased by reason

When a bailee declares his intention to convert a bailment, the School of Shamai says:

of a certain improvement, and not that the market value thereof has risen; *e. g.*, when the bailee converts a cow and, while in his possession, it brings forth young ones. The School of Hillel then holds that he must not return such offspring to the bailor. This interpretation is sustained by Alfasi and Maimonides, *Commentary on the Mishnah.*

When, however, the bailee converted an article which, at the time such conversion took place, was valued at one *zuz*, and while in his possession the value of such article was increased to four *zuzim*, he must pay to the bailor the sum of four *zuzim*, if he destroyed the article or disposed of it and is consequently unable to return it to the owner. The law says that a converter must return the article converted to the owner if it is still in his possession. The actual conversion, therefore, is made when the bailment is intentionally destroyed or disposed of by the converter, and at that time the article was of the value of four *zuzim*. If, however, the article converted was stolen from the possession of the bailee, he must pay one *zuz* only. In this case he is held liable for the wrongful taking it out of the possession of the owner, and when such conversion took place the value of the article was one *zuz* only (*Gemara* 43a; Maimonides, *Laws of Robbery*, Chapter III, Laws 1–2). In brief, all converters must pay the value of the article as at the time the conversion took place.

"He is liable"; and the School of Hillel says: "He is not liable until he has actually converted it; as it is said (Ex. XXII, 10): 'that he has not stretched forth his hand against the property belonging to his neighbor'; *e. g.*, if the bailee has bent down the cask which was stored with him, and has taken a quarter of a *lug* of wine therefrom, and thereafter the cask was broken (accidentally), he must pay only for the quarter which he has actually converted (28); but if he picks up the cask and takes a quarter of a *lug* of wine therefrom, and thereafter it was broken (accidentally), he must pay for the entire value of the cask" (29).

(28). The bailee, in order to be held liable as a converter of the bailment, must perform such an act as would in law be sufficient to vest title in the vendee in cases of bargain and sale (*vide* Introduction to Chapter IV, *infra*), but the mere intention of the bailee to take a bailment for himself, even when he makes a declaration of such an intention to two witnesses, does not constitute conversion.

(29). When the bailee lifts up the bailment, or performs any act which would in law be sufficient to pass title in the vendee in cases of bargain and sale, it is implied by law that the intention of the bailee was to convert the same, if he uses any part of it. He is then liable in every case, because he is guilty of a tort. It is, however, not essential that he shall actually take any part of the bailment in order to be held liable as a tort-feasor. If he performs any act, constituting legal possession, with the view of converting it, he is guilty of a tort (*Gemara* 44a; Alfasi; Maimonides, *Laws of Robbery*, Chapter III, Law 12).

CHAPTER IV

BARGAIN AND SALE OF PERSONALTY

INTRODUCTION

THE law of sales of personal property includes contracts of bargain and sale, and contracts of barter or exchange. The former is where a money consideration is given for the property sold; the latter is an agreement by which the parties exchange goods for goods.

The law as deducible from the Pentateuch is that a sale becomes consummated upon the buyer's payment of the agreed sum of the money consideration, and thereupon title to the subject-matter of the sale immediately vests in him. The risk of the loss of such goods, as a rule, attends the ownership of them. Hence, in cases of bargain and sale, it passes with the title to the buyer as soon as the sale is made (*Gemara* 47b). If the subject-matter of the sale remains with the seller after the consideration therefor has been given, it is the buyer who bears the loss when it is destroyed by fire or otherwise, and the seller is considered a gratuitous bailee, liable for gross neglect only (*Tosafot* to *Kidushin* 28b).

The Talmud, however, has modified the above named principle of law, and has enacted that, unless stipulated to the contrary, the mere payment of money does not suffice to consummate a bargain and sale. In order to effect a sale, it is necessary that there shall be an actual change of possession of the subject-matter. When the buyer takes possession of the goods contracted for to be sold, the sale is thereby made, and title to them passes to him immediately whether he then pays the money consideration or not. If, therefore, A says to B: "I will sell you my wheat for fifty shekels," and B, accepting such offer, takes the wheat into his possession, the sale is considered as consummated. Title to the wheat at once vests in B, although he has not yet paid the fifty shekels (Mishnah

II, *infra*). (As to the various modes of effecting a change of possession, *vide Kidushin.*)

The reason for the aforesaid modification of law is, as stated by Rabbi Johanan (*Gemara* 47b), that should the subject-matter of the sale be left with the vendor after the consideration therefor has been paid, he might not make proper efforts to save the same, should it be endangered by reason of an accident to his premises. The reason for the possible neglect on the part of the vendor is obvious. Title to the subject-matter of the sale having, according to the Mosaic Law, been vested in the vendee who would have to bear the loss, the vendor, as a gratuitous bailee, would be held liable for gross negligence only. On the other hand, should the title still remain in the vendor, he will exert all possible efforts to save it because the loss falls on him.

When, however, the reason for the above modification of law ceases, as for instance when the goods sold are already in the possession of the vendee in the capacity of a bailee or that of a warehouseman, the Law of Moses is abided by (*Gemara* 49b; sustained by Alfasi and Maimonides, *Laws of Sales*, Chapter III, Law 6).

The following principles of law are laid down in the Talmud with reference to the formation of contracts affecting the sale of personal property: 1. A binding agreement cannot be created by mere words; *e. g.*, A says to B: "Sell me your wheat for a certain sum of money," and B, in reply, says: "I accept your offer." This in itself does not constitute a binding agreement, for the breach of which damages could be recovered at law. The *Gemara* 49a, however, maintains that the party who retracts, after such negotiations have taken place, is not considered honorable in his dealings, as every person is morally bound to abide by his word. 2. When A, pursuant to B's acceptance of the offer, pays the consideration for the wheat but does not take it into his possession, and thereupon one of the parties retracts, such party is guilty of having violated a moral obligation of a higher nature, and a curse is imposed upon him for such violation, but no action at law lies therefor (Mishnah II, *infra*).

Although such negotiations are not legally binding, the Talmud nevertheless lays down rules of law as to when they shall be deemed consummated. The reason for these rules is that the Jewish jurists presumed that every person, being favored with a presumption of honesty, would not only forbear to violate a legal principle of law for which a remedy has been provided, but that he would also refrain from violating a moral obligation.

In the case of barter, where the consideration is an exchange of goods, it is only necessary that either party to the agreement shall take actual possession of the article to which he wishes to obtain title. By such an act, the barter is considered concluded, and neither party may then retract (Mishnah I, *infra*).

Mishnah I. (The delivery of) gold coins effects the purchase of silver coins, but not *vice versa;* (the delivery of) copper coins effects the purchase of silver coins, but not *vice versa;* (the delivery of) cancelled coins effects the purchase of valid coins, but not *vice versa;* (the delivery of) bullion effects the sale of coins, but not *vice versa* (1); (the delivery of) chattels effects the purchase of coins, but not *vice versa*. This is an established rule of law: (The delivery of) a chattel effects the exchange of another chattel (2).

Mishnah II. *E. g.*, if the vendee takes the fruit in his possession and does not pay the

(1). When two persons enter into an agreement, whereby they desire to effect a sale of different species of coins, which of these coins is to be considered the commodity, in order to determine who of the contracting parties is the vendee and who must acquire possession of such coins in order to effect the consummation of such sale? It is laid down in this Mishnah that the superior coin is the money and the inferior the merchandise. Hence, in a case where A, the owner of silver coins, seeks to buy the gold or the copper coins owned by B, and takes possession of them, the sale is then made, and neither party to the agreement may retract, because gold and copper coins, being less current than silver ones, are considered the commodity in the transaction.

(2). In the case of barter, however, where the consideration is an exchange of goods, we do not stop to dwell upon the theory as to what goods are more saleable and of greater market or standard value. If either party to the barter takes possession of the article to which he desires to obtain title, a binding barter is thereby made, regardless of the respective qualities of the goods to be exchanged.

money therefor, neither party may retract; if he pays the money but does not take the fruit into his possession, either party may retract. Nevertheless it was said that He Who inflicted punishment upon the Generation of the Flood (Gen. vi-x) and the Generation of the Scattered (Gen. xi, 1–10), will also punish one who does not stand by his word. Rabbi Simeon maintains that the one who has possession of the money is at an advantage (3).

Mishnah III. An overcharge of four silver *denars* from the sum of every twenty-four silver *denars*, which make a *sela* (one-sixth of the purchase price), constitutes overreaching. How much time is given to the deceived party within which to retract? Until he is able to show the commodity to a merchant or to his relatives (4). In the City of Lydda (in South Palestine), Rabbi Tarfon decided that an overcharge of eight silver *denars* to every *sela* (one-third of the purchase price) constituted overreaching, and the merchants of Lydda were pleased with his decision. When, however, they were told that the time given to the deceived party within which to retract is a whole day, they said to him that he should let them abide by the decision already laid down (that one-sixth of the purchase price constituted overreaching); and thus they abided by the decision of the sages.

---

(3). This tanna is of the opinion that when the vendee pays the money consideration but does not take possession of the subject-matter of the sale, it is the vendor only who may retract but not the vendee. His view is not the prevailing law, for if one party to an agreement may legally retract, the transaction is a *nudum pactum*, and consequently the other party is likewise not bound thereby (*Gemara* 47b; Maimonides, *Laws of Sales*, Chapter XII, Law 15).

---

(4). The Jewish law took precaution whenever it could that there be no such term as "The victim of the law." The jurists were well aware of the fact that the leniency of the law might, in many cases, result in a great number of litigations. They, however, disregarded the amount of trouble it might entail, because to them the relative rights of property were as sacred as natural rights.

It is the last named reason that actuated the Jewish jurists to extend the Mosaic commandment (Lev. xxv, 14): "And if thou sell aught to thy neighbor, or buy aught of thy neighbor's hand, ye shall not overreach one the other," to the rule of law as laid down in the present Mishnah. They maintain that in every agreement of bargain and sale, there is a condition implied by law to the effect that if the value of the subject-matter of the sale is inadequate to the consideration paid by the vendee, to the amount of more than one-sixth, the rule of *caveat emptor* (let the buyer beware) is then not applicable, and the sale is not effective. Being, however, that any rule of law, no matter how just in its inception, cannot with justice be extended too far, only a reasonable time is given to the party so deceived within which to reconsider the terms of the sale. If he does not rescind the sale before the expiration of such a reasonable time, the bargain is considered as consummated and the deceived party has no redress.

Mishnah IV. The law of overreaching applies to the vendor, as well as to the vendee (5); to a merchant as well as to a private man.

(5). In order that the vendor, as well as the vendee, may be protected, it is implied in law that a sale is made upon the condition that the consideration given by the vendee is commensurate to the value of the subject-matter of the sale, and if there be an undercharge of more than one-sixth, the sale is not to be binding upon the parties.

The vendor, in the case of undercharge, however, has no limited time within which to rescind the sale (*Gemara* 50b; Maimonides, *Laws of Sales*, Chapter XII, Law 6). The vendee, who has possession of the goods bought by him, is able to make inquiries of his relatives or a merchant as to the nature of his bargain by showing them such goods. But the vendor, Rabbi Judah says: "The law of overreaching does not apply to a merchant" (6). The deceived party is at an advantage: he may either demand the return of his money (and rescind the sale), or recover the overcharge (and confirm the sale) (7).

having parted with his goods, has no such means by which to ascertain whether or not he was deceived. An unlimited time is, therefore, given to him within which to rescind the sale: until an opportunity will present itself to him of buying an article of identical nature and thereby ascertaining whether or not he has been deceived (*Gemara* 51a).

(6). Rabbi Judah is of the opinion that a merchant, who is an expert in appraising commodities, will not erroneously make an undercharge. The reason he sold his merchandise in this particular instance at a sacrifice is that he probably needed the money for the purpose of investing the same in a more paying proposition. Being presumed that he made such undercharge with full knowledge, he cannot rescind the sale, because in such a case he is not protected by law (*Gemara* 51a). The prevailing opinion, however, is that a merchant is not to be discriminated against for the reason that he, too, is apt to make an erroneous undercharge (Maimonides, *Laws of Sales*, Chapter XII, Law 8; Rabbenu Asher).

(7). The law regarding remedies in cases of overreaching is as follows: If it is less than one-sixth of the purchase-price, the deceived party is remediless;

Mishnah V. How much should a *sela* (or any other kind of coin) be defaced, and the law of overreaching should not apply thereto? Rabbi Meïr says: "Four *isars*, one *isar* to each *denar*" (one twenty-fourth); Rabbi Judah says: "Four *pundiuns*, one *pundiun* to each *denar*" (one-twelfth); Rabbi Simeon says: "Eight *pundiuns*, two *pundiuns* to a *denar* (one-sixth) (8).

Mishnah VI. How much time is given to the deceived party within which to retract

---

if it is one-sixth, the deceived party cannot rescind the sale, but has the remedy of recovering such overcharge or undercharge; if it is more than one-sixth, the sale is null and either party to the sale may rescind (*Gemara* 50b; Alfasi; Maimonides, *Laws of Sales*, Chapter XII, Laws 3–4).

Rabbi Zerachiah ha-Levi says that when the overreaching is to the extent of more than one-sixth, the deceived party may rescind the sale whether the other party consents thereto or not. The party who has deceived, however, has the right of rescission only where the deceived party elects to affirm the sale and seeks to recover the amount of overreaching; but he has no right of rescission when the deceived party elects to abide by such sale and does not seek to recover the amount of overreaching (*Tosafot* to *Gemara* 50b).

(8). The view of Rabbi Simeon is the prevailing law (Maimonides, *Commentary on the Mishnah*).

(in cases of coins)? In large cities, until he is able to show it to a money-changer (9), and in villages, until the Eve of Sabbath (10). If, however, he (who gave such defaced coins) recognizes them to be his, he is bound to accept their return, even after the expiration of twelve months (11); (but if he refuses to

(9). In cases of coins, the time within which the deceived party may retract is not the same reasonable time provided for in cases of merchandise (Mishnah III, *supra*), because laymen are generally incompetent to appraise money (*Gemara* 52b).

(10). On Fridays, money-changers were accustomed to visit villages and small towns because the inhabitants needed some coins of small denominations wherewith to buy food for Sabbath (*l. c.*).

(11). The owner of the coins is bound, by the principles of equity, to accept them after the expiration of the time provided for by law, but no action lies against him if he refuses to comply with such an obligation.

By the term equity, known in the Jewish law either as "laws which deal with principles beyond the jurisdiction of the law," or as "laws which a man is bound to observe in order to satisfy Heaven," was meant that every individual is bound by a divine ordinance to do justice to his fellow-man, even in cases where the law does not require him to do so. As a rule, the Jewish law knew of no wrongs which were remediless, and consequently there arose no need for supplying equitable remedies for wrongs.

accept them after the expiration of the time provided for), the deceived party has nothing

No action at law lay for a violation of an equitable principle. Nevertheless, Jewish jurists laid down principles by which to ascertain when there could possibly exist a moral or an equitable wrong without a legal wrong, because it was presumed that no man would violate an ordinance although it is supported by a moral obligation only. *E. g.*, A gives a defaced coin to B, and B, after the lapse of the time provided for by law for its return, offers to give it back to A. If the latter refuses to accept it, he is not guilty of a legal wrong, and therefore no action at law lies against him. A is nevertheless bound to accept the coin in order to satisfy Heaven, as he is otherwise guilty of violating a moral duty. (*Vide* also note 10 to Chapter III, *supra.*)

Such an obligation, although in the strict sense of the word purely a moral duty and therefore not enforcible at law on principle, was nevertheless, as we find in a great many instances in the Talmud, rigidly enforced by the Rabbis. A violation of a rule of civil law, known in Jewish jurisprudence as "laws relating to dealings between man and man," involved not only a legal wrong for which a remedy at law could be had, but also a transgression of a holy command and therefore a sin against God for which no action lay. The Rabbis, therefore, who acted not only in the capacity of tribunals to determine legal rights and wrongs, but likewise performed the function of ministers to safeguard the sacredness of the religion, very frequently took the liberty of enforcing equitable principles although they were purely moral in their nature.

but mere resentment against him. A coin (defaced to the extent hereinbefore mentioned) may be used for the purpose of redeeming the second tithe (12) without any fear whatever, because the one who refuses to accept such a coin is considered a person of a bad disposition.

Mishnah VII. Four silver *denars* (one-sixth of a *sela*) constitute overreaching; a claim, no less than two silver *denars* (or their value) (13); an admission of a debt, a

---

(12). The second tithe is that part of the products of the soil which was to be consumed by the owner in Jerusalem. When, however, such tithe consisted of a burden which was too troublesome for the owner to convey to Jerusalem, or the way was too far, the owner of such tithe was allowed to redeem it with money, adding one-fifth to the original value of the products, and spend the money in Jerusalem (Deut. XIV, 22–27).

(13). A makes a claim against B, and B admits a part of the liability. If no other evidence is produced by either party, B must, according to the Law of Moses, pay the amount he has admitted owing, and take an oath as to the balance of the claim he has denied (*Shebuoth*, Chapter VI, Mishnah 1). When the defendant admits the existence of the transaction which is the basis of the claim made by the plaintiff, a presumption is thereby raised in favor of the plaintiff. This is sufficient proof of the plaintiff's claim, and the *perutha* (the smallest coin then in circulation). In five cases the value of a *perutha* is prescribed: 1. For an admission of a debt. 2. For the betrothal of a woman (14). 3. One who benefits by a *perutha's* worth of the property belonging to the Sanctuary, has committed a transgression (15). 4. One who finds an article worth a *perutha* is bound to

burden is then cast upon the defendant to rebut the presumption with an oath and thereby balance the plaintiff's evidence. In order that the above named rules of law should apply, the claim made by the plaintiff must be for no less than two silver *denars*, and the part admitted by the defendant must be for no less than a *perutha*. If the defendant in such a case refuses to take the prescribed oath, he must pay.

(14). If a man who wishes to marry a certain woman says to her: "Thou art betrothed to me," and such woman accepts the offer, this agreement is sufficient to make it a valid marriage, if the acceptance of the offer by the woman is supported by a valid consideration from the man. Even when the amount whereby she benefits does not exceed the value of a *perutha* it is a valid consideration. (*Vide Kidushin*, Chapter 1, Mishnah 1.

(15). When a person is benefited to the value of a *perutha* from the property of the Sanctuary, he must sacrifice the prescribed offering, and, as a penalty, add one-fifth to the principal whereby he was benefited and return the same to the Sanctuary (Lev. XXII, 14).

proclaim it. 5. He who has robbed his neighbor of the value of a *perutha* and has sworn falsely, must return it to the robbed party (personally), even should such party happen to be at that time at Modai (16).

Mishnah VIII. There are five instances in which a man must add one-fifth (to the principal amount): 1. When one (who is not a priest) partakes of the heave-offering (17), or the heave-offering of the first tithe of *Demai* (crop about which there is a suspicion) (18), or the priest's share of the dough (Num.

---

(16). A personal return of the article or of the amount robbed must be made only when the person who has committed such robbery swore to deny the fact, and thereafter admitted that he had committed perjury (*Baba Kama* 103a).

(17). The heave-offering was that part of the products of the soil which was to be given by all husbandmen to the Priest. The amount thus given was in no case less than one-sixtieth of the products (*Demai*).

(18). The Levite had to give the Priest one-tenth of the tithe given to him. Ordinarily ignorant people were unaware of the existence of the aforesaid law. It was, therefore, enacted that a person, upon buying grain from an ignorant man, must set aside one-hundredth part for the Priest before he was allowed to consume the same. It is probable that the Levite had

XV, 20), or the first ripe fruit (Lev. II, 14) (19). 2. When one redeems the fruits of a plantation in its fourth year (20), or of his second tithe (21). 3. When one redeems an article which he has dedicated to the Sanctuary (Lev. XXVII, 9–20). 4. When one is benefited to the value of a *perutha* of the property belonging to the Sanctuary. 5. When one has robbed his neighbor of the value of (not less than) a *perutha* and has sworn falsely,—in all these cases one-fifth must be added to the principal.

taken his tithe when the grain was in such a state of growth that no heave-offering had to be given to the Priest, and consequently it was incumbent upon the peasant to set it aside for the latter, when the grain had become ripe enough for a heave-offering to be separated (*Demai*).

(19). All the offerings enumerated under division *one* are classed by the Mishnah as belonging to the same class, because all of them belong to the Priest and are called heave-offerings.

(20). When one plants a vineyard, he is not allowed to eat the fruit thereof during the first three years. On the fourth year, he must bring the products to Jerusalem and eat them there. If, however, it is too burdensome for him to carry such products, he may redeem the same with money, adding one-fifth to their value and spend the money in Jerusalem (Lev. XIX, 23–25).

(21). (*Vide* note 12, *supra.*)

Mishnah IX. To the following the law of overreaching does not apply: Slaves, real property (22), documents of indebtedness (23), and

(22). The law of overreaching does not apply to cases where the subject-matter of the sale is real property, because it is of an imperishable and ever-existing nature, and therefore the real value thereof cannot be estimated by the courts. Furthermore, a particular piece of property may have peculiar advantages of location and vicinage, which no other piece of property may possess. One piece of property, therefore, cannot be compared with another one in order to estimate its value and determine thereby whether there was deception in this particular instance. In the case of a slave, the master may compel him to marry a woman, and the issue of such marriage will also belong to the master. As the property right in a slave, like the property right in realty, is ever-existing, it is impossible for the courts to estimate its real value, and therefore the law of overreaching does not apply to a case where a slave is the subject-matter of the sale.

The *Gemara* 56b, however, states no reason for the rule of law laid down in this Mishnah, but says that this rule of law is deduced from the Pentateuch (Lev. xxv, 14); that the term "*buy aught from thy neighbor's hand*" used therein applies only to articles which are capable of being delivered from one person to another. It further maintains that slaves are in every case classed as real property.

(23). When one buys a document of indebtedness from the holder, and thereafter he is unable to collect any description of property belonging to the Sanctuary (24). The law that a thief must pay double the amount by him stolen (when he is ready to return the stolen property to the owner), and must pay four or fivefold when he disposed of such property, does not apply to cases where the above named articles were stolen (25). A gratuitous bailee does not have

---

anything, he cannot rescind the sale by reason of his having been overreached. The *Gemara* 56b says that the law of overreaching applies only to cases where the consideration given by the vendee is for acquiring immediate possession of the subject-matter of the sale. When documents of indebtedness are sold, the consideration given by the vendee to the vendor is not for the possession of the documents, but for the *chose* in action which he acquires, the documents being given to him only for the purpose of enabling him to produce evidence by which to prove the debt and the assignment thereof. In such a case, therefore, the vendee, upon effecting the sale, assumes the risk of not being able to collect the debt, and the law of overreaching has no application to a case where the vendee is aware of the possibility of losing all he paid to the vendor.

(24). The *Gemara* (*l. c.*) says that the law of overreaching applies only to dealings between man and man, but not to dealings between man and God, and deduces this rule of law from the term *thy neighbor* used in Lev. xxv, 14.

(25). The thief must not pay the penalty in these to take an oath (concerning the articles enumerated above, if lost or stolen while in his custody), and a bailee for hire does not have to pay for them (in cases where he is otherwise liable). Rabbi Simeon says: " To such articles belonging to the Sanctuary for which one has responsibility, the law of overreaching does apply; but to those articles for which no one is responsible, the law of overreaching does not apply" (26). Rabbi Judah says:

cases, because real property and slaves are incapable of being stolen as they are always deemed in the eyes of the law to be in the possession of their owner, and no theft can be committed unless there is a temporary change of possession from the owner to that of the thief. When property belonging to the Sanctuary is stolen, the thief is exempt from paying the penalty because it was not stolen from a *fellow being.*

(26). One makes a vow to bring a burnt offering, and does not designate any particular animal which he is to offer. Thereupon he sets aside one of his animals for that purpose, and if such animal receives a deformity of body so that it cannot be sacrificed on the altar, he must then offer another animal in order to fulfill his vow. If he then sells the animal with such a blemish, the law of overreaching does apply to the sale, because it is then his property and not that of the Sanctuary. If he vows to offer a particular

"The law of overreaching does not apply to cases where the subject-matter of the sale is one of the following: Scrolls of the Law, animals or pearls" (27). But he was told (by the school) that the articles enumerated by the anonymous tanna are conclusive.

Mishnah X. Just as there is an imposition in cases of bargain and sale, so there is a wrong done by means of words. One must not say to his neighbor: "For how much will you

animal as a sacrifice, and thereupon such animal receives a blemish, he must not substitute another one in its stead. When he sells such an animal, the law of overreaching does not apply to the sale, because it is then the property of the Sanctuary. Rabbi Simeon's view does not prevail; Maimonides, *Commentary on the Mishnah.*

(27). Rabbi Judah is of the opinion that not only has the law of overreaching no application to cases where the subject-matter of the sale is such as is impossible of being estimated by the courts on account of its ever-existing nature, but that it likewise has no application to cases where personal property is sold, if such personalty either has a *pretium faciendi*, or a value from some other peculiar cause, and therefore it is absolutely impossible for the courts to estimate its value. His view is not the prevailing law; Alfasi, sell me this article," while he has no intention of buying the same. One must not say to a person who has repented: "Recollect thy former deeds." One must not say to a descendant from proselytes: "Recollect the deeds of thy forefathers," as it is written (Ex. xxxii, 20): "And a stranger thou shalt not vex, nor shalt thou oppress him" (28).

Mishnah XI. One must not mix together fruits from various fields (29), even when the fruits of such fields are all old, much less may he do so when he substitutes new for old. Indeed it was said that in cases where the subject-matter of the sale is wine, the seller

---

quoting Rab Hai Goan; Maimonides, *Laws of Sales*, Chapter XII, Law 8.

(28). Maimonides in his *Commentary on the Mishnah* says that a violation of any of the rules of law enumerated in this Mishnah is much graver a crime, and is considered a much greater violation of the principles of morality, than overreaching in cases of bargain and sale.

(29). Only when the field, out of which the fruits contracted for to be sold were to be produced, was expressly mentioned in the agreement he had entered with the vendee, he is not permitted to mix fruits of different fields (Rashi to *Gemara* 59b).

may mix strong with mild (30). One must not mix the lees of one wine-jug with another, but he (the seller) may give him (the purchaser) the lees belonging to the wine sold. If his wine gets adulterated with water, he must not sell it in his store at retail, unless he informs the buyers of such fact; and he must not sell it to a merchant, however, even when he informs him of the fact, because a merchant buys it only with the intention of deceiving consumers. In a place where it is customary to mix water with wine, it may be done so (31).

Mishnah XII. A merchant may buy grain from five different granaries and put it into one store-room (for the purpose of selling the same); he may likewise buy wine from five different presses and put it into one cask, provided he has not the intention of mixing it (32). Rabbi Judah says: "A storekeeper is not permitted to distribute parched ears or nuts to little ones, because he induces them thereby to buy all their necessities at his place"; the sages allow it (33). He further maintains that a storekeeper is not allowed to sell below (spoil) the current market price. The sages say that we have to be grateful to him for such an act (34). A store-keeper must not sift pounded-beans (35). The sages

---

(30). The vendor is permitted to mix strong wine with mild only when the agreement calls for mild wine, but when it calls for strong wine, he is not allowed to mix mild therewith (Rashi to *Gemara* 60a). Rabbenu Asher, however, allows it even in the last named instance.

(31). One is allowed to mix water with wine in this case, because the buyers, by reason of the prevailing custom, are aware of such adulteration and consequently are not deceived thereby (Rashi to *Gemara* 60a).

(32). A merchant is permitted to mix and sell fruits of different fields because the buyers are aware of the fact that a merchant generally buys fruit from various dealers or peasants, and therefore are not deceived thereby, unless the merchant makes a false representation that the fruits have been produced by one and the same field (Rashi to *l. c.*).

(33). The view of the sages is the prevailing law (Maimonides, *Commentary on the Mishnah*).

(34). The *Gemara* 60b says that the sages allow it for the reason that it will encourage competition. Their view is upheld by Maimonides and many other jurists.

(35). He must not separate the waste from the beans and sell them at a higher price than if they repermit it; they, however, admit that he must not sift the beans only from the top of the bin, because this tends to deceive the eye (of the purchaser). The embellishment of slaves, animals or implements (that are to be sold) is prohibited (36).

mained unsifted, because, as there is no fixed market price for sifted beans, there may be room open for deception.

(36). The seller must not dye a bondman's gray beard black; nor drug an animal so as to raise and stiffen its hair; nor paint old implements to make them look like new, because this tends to deceive purchasers.

CHAPTER V

USURY AND USURIOUS CONTRACTS

INTRODUCTION

THE law prohibiting usury is based upon the commandment of the Pentateuch (Lev. xxv, 37): " Thy money shalt thou not give him upon usury, nor lend him thy victuals for increase." In interpreting this commandment, the Talmud says that the taking of any kind of interest, no matter how trivial, is prohibited by the Mosaic Law. The Talmud likewise draws a distinction between biblical and rabbinical usury.

Usury as prohibited by the Pentateuch is *direct* or *express* interest; usury as prohibited by the Talmud is *indirect* or *contingent* interest. *I. e.*, the Law of Moses prohibits any loan when effected by the parties with the express understanding that the lender shall receive some compensation; while the Talmud forbids any transaction or negotiation which, although legitimate in its inception, may ultimately result in a usurious transaction. Illustrations of the last named rule of law will be found in the Mishnahs which follow.

Direct interest may be recovered by the borrower from the lender during the lifetime of the latter, but not from his heirs; indirect interest cannot be recovered at all (*Gemara* 61b, 62a, Alfasi and Maimonides, *Laws of Creditor and Debtor*, Chapter VI, Law 5; Chapter IV, Law 4, 6).

A defense of usury is not available at law. A suit can be sustained by the lender to recover back the money actually lent, but not the interest thereon (*Gemara* 72a; Maimonides, *l. c.*, Chapter IV, Law 6).

Mishnah I. What is to be considered usury (which is forbidden by the Law of Moses), and what is to be considered an increase (which is prohibited by the Rabbis)? Usury is when one lends a *sela* (four *denars*) for five *denars*, or two *seahs* of wheat for three—(this is forbidden) because it is usurious. And what is considered an increase? A person buys wheat from his neighbor at a golden *denar* (twenty-five silver *denars*) a *kor* and such was the current market price (1); the price of wheat subsequently advanced to thirty silver *denars* a *kor*; whereupon the buyer says to the seller: "Give me my wheat, as I wish to sell it and buy wine with the money realized therefrom." The seller then says: "Your wheat is sold to me for thirty *denars* a *kor*, and I will give you wine for that amount," but he has no wine in his possession (2).

(1). The vendor does not deliver the wheat to the vendee immediately upon the making of the agreement, but agrees to deliver it whenever requested by the vendee. (As to the validity of this transaction, *vide* note 18, *infra*).

(2). A is indebted to B in a certain sum of money, say one hundred *denars*. When the debt becomes due, A agrees to pay it with merchandise, say one hundred *kors* of wheat at the rate of one *denar* per *kor*, which is the current market price. A has no wheat then for immediate delivery, but agrees to deliver the stipulated measure of wheat at some time in the future. Such a transaction is prohibited as usurious, because the value of the one hundred *kors* of wheat agreed to be

Mishnah II. The creditor must not live

delivered by A may in the meantime advance, and thus B in return will receive more value than the actual amount he loaned to A.

If, however, A, at the time of the formation of the above mentioned agreement, is possessed of the wheat, it is not then a usurious transaction, because title to such wheat passes immediately to B upon his agreement to accept the wheat in payment of his debt. And if the price of the wheat thereafter advances, it is then B's merchandise which has so advanced in value (*Gemara* 66a; Alfasi and Maimonides).

An agreement of the aforesaid nature is not enforcible at law, because the vendee did not take the subject-matter of the sale into his possession. (See Introduction to Chapter IV, *supra*). There is nevertheless a moral obligation imposed upon the parties not to rescind the sale, and it was therefore presumed by the Jewish jurists that the parties would not recede from the agreement (*Tosafot* to *Gemara* 62b).

In the case cited in the text, the seller owes the buyer a certain quantity of wheat, say ten *kors*, which is of the value of twenty-five silver *denars* per *kor*. When delivery has to be made, pursuant to their agreement, the price of wheat has advanced to thirty silver *denars* per *kor*, and the seller agrees to deliver wine to the buyer, at the then fixed market price, for the value of ten *kors* of wheat at thirty *denars* per *kor*, but has no wine ready for delivery. This transaction is prohibited by law as usurious, because the seller by virtue of the said agreement becomes indebted to the buyer for the value of ten *kors* of wheat in his debtor's court-yard gratis (3), or even at a reduced rent, it being usury. Rent may be increased but not the purchase-price; *e. g.*, the owner lets his court-yard to a tenant and stipulates: "If you pay me now in advance (for the entire year), you shall have it for ten

at thirty *denars* per *kor*, and agrees to pay the debt with wine which he will subsequently obtain. The debt can be considered as paid only upon the actual delivery of the wine to the creditor, because title cannot pass to a thing not possessed by the seller at the time the sale is effected (*Gemara* 66b; *Yebamoth* 93a; Maimonides, *Laws of Sales*, Chapter XXII, Law 2); and when the seller will have wine ready for delivery, the price thereof may have advanced. Yet the seller, by virtue of the terms of the agreement, will have to deliver to the buyer the measure of wine stipulated for irrespective of its present market value. The buyer, who is now considered a mere lender, will consequently receive more than he is actually entitled to.

(3). The lender is not allowed to occupy the borrower's court-yard even in a case where such court-yard is vacant, the owner having no intention of letting the same or of realizing anything therefrom, and the lender not being benefited by such occupation because he has a court-yard of his own (*Gemara* 64b; Alfasi; Maimonides, *Laws of Creditor and Debtor* Chapter VI, Law 2). It is prohibited for the reason that it will appear as a usurious transaction to those who are unfamiliar with the facts of the case (Rashi to *Gemara* 64b).

selas, but if you pay me monthly, you will have to pay me one *sela* per month"—this is permitted (4). If one sells his field and says to the grantee: "If you will pay me for it now, you can have it for one thousand *zuz;* but if you will pay me for it at harvest time, you will have the field for twelve hundred *zuz*"—this is prohibited (5).

(4). Such an agreement is allowed because the terms thereof are construed to import that the actual value of the court-yard is twelve *selas* per annum, but that the landlord is willing to reduce the rent to ten *selas* per annum, if the tenant will pay in advance for the entire year. In such a case there is nothing due from the tenant to the landlord before the expiration of the term of the lease, because rent is not payable in advance (*Gemara* 65a). When, therefore, the tenant elects to pay for the premises one *sela* monthly, the increase of the two *selas* per annum cannot be considered usury, in that the lessor permits him to pay the ten *selas* in monthly instalments. For, as hereinbefore stated, rent is not payable in advance, consequently there is no debt accruing, and the question of usury cannot be raised in cases where there is no debt.

(5). In cases of bargain and sale, however, the buyer, when the subject-matter of the sale is delivered to him by the seller, must pay the purchase money agreed upon immediately upon the consummation of the sale. If he does not pay the purchase money then, such sum becomes a debt. In the case cited in the text, the

Mishnah III. One sells his field and, receiving part-payment therefor, says to the grantee: "Whenever you desire, bring me the balance of the purchase-price and take possession of your own"—this transaction is prohibited (6).

grantor sells his field for one thousand *zuz* if the grantee will pay immediately upon the delivery, but if the grantee does not pay then, he will have to pay for the field twelve hundred *zuz*. The terms of such an agreement clearly indicate that the field sold is of the value of one thousand *zuz* only, and that the two hundred extra *zuz* are charged to the grantee by the grantor for the privilege granted to him in that he does not have to pay the entire purchase-price which is due immediately. Such an agreement is therefore prohibited by law as usurious (*l. c.*).

(6). An agreement of the nature mentioned in the text is forbidden as usurious only when the grantor consents that title to the field shall vest immediately in the grantee upon the payment of the deposit, and that the grantor shall retain such property as security for the payment of the balance of the purchase-price. If the parties agree that in the meantime and before such balance is paid, the grantor is to reap the benefits of the field, it is then prohibited as usurious because it amounts in fact to this, that the grantee permits the grantor to consume the products of the field, which according to the terms of the agreement belong to him, because the grantor does not insist upon immediate payment of the balance due.

If, on the other hand, they agree that, in the mean-

One lends money to his neighbor on his field, and the creditor says to the debtor: "If you do not pay me within three years, the field is mine." It passes to him (if the sum due was not paid before the expiration of the three years) (7). And thus was Boëthos

time and before such balance is paid, the grantee is to consume the fruit produced from such field, it is likewise prohibited as usurious, because if the grantee does not pay the balance of the purchase price, he will have received such fruit as usury for a loan. For when the grantee rescinds the sale after having given part payment to the grantor, he may either recover the sum paid, or, if the grantor so elects, get a part of the realty to that amount. (*Vide* note 5 to Chapter VI, *infra*).

The products must, therefore, in such a case be deposited with a third party. If the grantee pays the balance due, the products will be turned over to him, and if he does not pay, they will be turned over to the grantor (*Gemara* 65b; Alfasi, Maimonides, *Laws of Creditor and Debtor*, Chapter VI, Law 6).

(7). This rule of law can only be interpreted, that the agreement between the parties was made to the effect that the lender should take title to the field immediately upon effecting the loan, but that he gives the borrower three years time within which to pay, and upon such payment he agrees to reconvey the field to the buyer. Otherwise, such an agreement would be invalid and not binding upon the parties (*Gemara* 66b; Maimonides, *Laws of Sales*, Chapter XI, Law 7).

ben Zonin accustomed to do under the advice of the sages.

It is a well established principle of law in Jewish jurisprudence, that every obligation which a man obligates himself to do or to refrain from doing, conditioned upon the non-fulfillment of a certain promise made by him to the promisor, is considered an insincere undertaking and is therefore not binding at law. *E. g.*, A borrows money from B to be paid at a certain fixed time, and in addition to A's promise of payment he says to the creditor: "If I do not pay you at the time specified by me, then you shall have my estate in payment of your loan." If the time specified elapses and A does not pay, B has no right, by virtue of said agreement, to take A's estate, because the provision embodied in the agreement relating to the forfeiture of A's estate is considered in law a mere penalty (*asmaktha*, insincere promise), and is therefore invalid and not binding upon the parties(*Gemara* 66a–66b).

Rashi and *Tosafot* (to *l. c.* 66b), sustaining the dicta in the *Gemara* (pp. 73b, 74a and 104b), are of the opinion that an agreement of the nature above mentioned cannot be called a penalty unless there is an actual forfeiture of property, as when the estate to be forfeited by the borrower is of much greater value than the sum of money he has received under the loan; or where the thing which the promisor obligates himself to do is an utter impossibility, otherwise such an obligation is not considered a penalty and is absolutely valid.

The weight of authority is not in favor of the above mentioned opinion. It is well settled that any promise

Mishnah IV. A person must not give his merchandise to a shopkeeper (to sell at retail) on half profits (over and above the wholesale price with which he is charged); nor may a person give the shopkeeper money (wherewith he may buy merchandise at wholesale and then sell at retail) and divide the profits among themselves, unless the latter is compensated for his trouble (8); the

conditioned as aforesaid is invalid, and it is immaterial whether the property to be forfeited is of greater value than the amount of the loan, or whether or not the thing the promisor obligates himself to do is a matter of impossibility.

All jurists, however, concur that if title to the property is to vest immediately in the creditor when the loan is effected, such an agreement is valid even where there is a forfeiture of property (*Gemara* 66b). The ruling of the present Mishnah is, therefore, sustained by all authorites.

(8). These transactions are prohibited by law as usurious because the retailer in such cases assumes the responsibility of a borrower to bear one-half the value of the merchandise in cases of loss, while for the other half he is considered a bailee (*Gemara* 104b). It consequently amounts to this, that because the owner has loaned one-half of his merchandise to the retailer, the latter, in consideration thereof, undertakes to sell the other half of the merchandise belonging to the former.

breeding of chickens and the raising of calves or foals on half profit are forbidden, unless the one who accepts them is compensated for his trouble and for the feed (9). Calves and foals may, however, be accepted (without appraising them) (10), to be raised until they

In other words, the owner gets the benefit of the retailer's labor as compensation for his loan (Rashi to *Gemara* 68a).

Such a transaction is permitted either when the retailer is compensated for his work (*Gemara* 68b; Alfasi); as when he is to receive profits to any greater extent than he has to bear losses, or when the retailer invests some money in the transacting of such business, in the nature of a co-partnership (Maimonides, *Commentary on the Mishnah*).

(9). A, the owner of an animal, may not stipulate with B that the latter shall raise the animal and the increase in value occasioned by such raising shall be divided between both parties in the proportion they desire to stipulate. (For the reason of this rule of law, *vide* note *ante*).

(10). The retailer expressly agrees not to assume any greater responsibility than that of an ordinary bailee. It is permitted, because this does not then amount to a loan but to an ordinary bailment for hire for which the bailee is to receive half of the profits as a contingent compensation. The rule of law, stated in the text, stands for the further principle, that when an agreement of the above mentioned nature is entered attain one-third of their growth, and an ass until it is fit for carrying burdens.

Mishnah V. A cow, an ass, or any other animal that earns its keep by its labor, may be appraised at half profits and losses (11). In the places where it is customary to divide the offspring immediately (after their birth), it should be done so; and where it is customary to raise them, it should likewise be done so. Rabban Simeon ben Gamaliel says: "A calf or a colt may be appraised with its mother" (12). A lessee may offer higher rent for the field leased by him in consideration of a loan

---

into between two parties it is considered a co-partnership agreement, and neither of the parties may dissolve such co-partnership before the expiration of the term mentioned in the text (Maimonides, *Commentary on the Mishnah*).

(11). This rule of law holds true only when the bailee is entitled to retain for himself all gains realized from the work of the animal (Rashi to *Gemara* 69b), for then he receives extra compensation for his labor.

(12). The owner does not have to pay the bailee for the maintenance and care of the calf or colt. The view of Rabban Simeon is not favored by weight of authority (Maimonides, *Commentary on the Mishnah*).

for improvements, and need not fear the appearance of usury (13).

Mishnah VI. An "iron sheep" may not be accepted from an Israelite, it being usurious (14); but it may, however, be accepted from a non-Israelite; and one may borrow from him and lend to him on usury (15). This is also allowed to be done to a proselyte (who has obligated himself not to worship idols, but

---

(13). A leases an unmanured field to B for ten *kors* of wheat per annum. Thereafter B says to A: "Give me two hundred *zuz* which I will invest in fertilizing the field, and in consideration thereof I will raise the rental named in the lease, and give you twelve *kors* of wheat together with the two hundred *zuz* which I have taken from you" (*Gemara* 69b). This transaction is allowed because the increase of the two *kors* of wheat is not considered as compensation for the loan of the hundred *zuz*. The original agreement entered into between the parties has, as a matter of law, been terminated by this new agreement, and a new contract has been entered into between the parties for the leasing of a manured field in consideration of which the lessee promises to pay two hundred *zuz* plus twelve *kors* of wheat per annum.

(14). An "iron sheep" is where A sells his flock *on payment in terms* to B, under the condition that the profits realized be divided between the parties until payment in full has been made, and that B should bear all losses sustained.

(15). The Pentateuch (Deut. xxii, 21) says: "From

an alien thou mayest take interest; but from thy brother thou mayest not take interest." As stated in note 8 to Chapter II, *supra*, the reason non-Israelites are in certain instances excluded from enjoying the benefits of the Jewish law is that there is a want of mutuality. Among the neighboring nations of the Jews, the taking of interest was absolutely legitimate, and an action at law could be maintained by the lender to recover the money lent and also the interest thereon (*Gemara* 62b).

Jewish jurists have followed the law of the Pentateuch, permitting a Jew to take interest from a non-Jew, but they have likewise made it legal for a Jew to give interest to a non-Jew; otherwise the borrower as well as the lender is guilty of violating the commandment prohibiting usury (Mishnah XI, *infra*). The reason for their having enacted such a law was that they desired to make the validity of taking usury from a non-Israelite reciprocal and mutual. That this was the reason such law had been enacted is further obvious from the rule of law laid down in the present Mishnah that usury may be taken from a proselyte. According to the Talmudic definition, a proselyte is one who has obligated himself not to worship idols, but did not obligate himself to observe all the Jewish laws. But had he undertaken to observe all the laws of the Jews, no usury could then be taken from him although he may not be a Jew in the true sense of the word, for then he would be compelled to reciprocate the benefits he derives from such laws.

did not obligate himself to observe the Jewish law). An Israelite may lend (to one of his race) money belonging to a non-Israelite upon usury, provided it is done with the knowledge of the non-Israelite (16).

Mishnah VII. No stipulation may be made to buy crop (to be delivered at some future time) before the market price is known (17);

---

(16). Rab Papa (*Gemara* 71b) says that if an Israelite has in his possession money belonging to a non-Israelite, he is not allowed to lend it to another Israelite with the understanding that the latter shall pay interest to the non-Israelite, even when this is done with the latter's consent. When, however, the non-Israelite personally turns over the money to the supposed borrower, it is permitted even when this is done at the instigation of the former borrower. His view is sustained by Maimonides, *Laws of Creditor and Debtor*, Chapter v, Law 3, and by the greater weight of authority.

(17). A is not permitted to advance money to B in consideration of the latter's promise to deliver to the former a certain quantity of fruit at a certain price whenever demanded by the former, before the market price is fixed. This is prohibited because the price for the fruit stipulated to be sold may advance, and B, by virtue of his agreement, will have to deliver to A the quantity of fruit agreed upon. A, the buyer, will then get interest for his money which was with the seller, because the quantity of fruit delivered when, however, the market price is known, an agreement to that effect may be made, for although the vendor has no crop in his possession as yet, others have (18). If the vendor

now will have been worth more than the money advanced by him.

In order that goods may be the subject of a bargain and sale, that is, of a present sale under which title passes to the purchaser at once, they must be in existence when the contract is made. (View of Rab Nachman, *Gemara* 66b). When the market-price of fruit is not fixed, although it may be obtained elsewhere, it cannot be said to be in existence in as far as the contracting parties are concerned, as it is uncertain whether it can be obtained for the price stipulated. The money, therefore, given by A to B for future deliveries of merchandise of which he is not possessed, is considered a mere loan to be repaid with a certain quantity of merchandise at a certain price whether such merchandise will depreciate or advance in value.

(18). When, however, the market price of the fruit to be delivered in the future is fixed, the aforesaid agreement is not considered usurious, because the vendor, at the time of the formation of the agreement, is able to obtain fruit elsewhere, for the price agreed upon, with the money he obtained from the buyer; hence, the subject-matter of the sale is, in contemplation of law, in existence. In such a case, therefore, it is of no moment whether the vendor is actually possessed of the subject-matter of the sale or not. An agree-was first in the harvest, a person may conclude a bargain with him for the grain in the stack; for grapes in the basket (in which grapes are carried from the vineyard during vintage); for the olives in the vat (where olives are packed until they form a viscid mass, although the market price is not yet known) (19); a bargain may be concluded for

ment of the aforesaid nature is not obligatory or enforcible at law, as the law requires an actual change of possession to make a binding bargain and sale, but if the parties to such an agreement elect to abide by its terms in order not to violate the moral obligation such an agreement creates and for the violation of which a curse is imposed (Chapter IV, Mishnah II, *supra*), the agreement is valid.

(19). When a thing is in a state of embryo, but has not yet reached that state of development in which the vendor is obligated to deliver the same to the vendee, it may be the subject-matter of a present sale. (As to the validity of such sale, *vide* note *ante*). Title to the subject-matter of the sale vests in the vendee immediately upon the consummation of the sale, and if the price thereafter advances, it is the vendee's benefit, for it was his merchandise which has advanced in value (*Gemara* 63a).

Rab (*Gemara* 74a) is of the opinion that if the goods, intended by the parties to be made the subject of a present sale, are in such a state as need undergo *two* the clayballs of a potter; for lime in the kiln; and for manure (although it is not ready for delivery) at any time in the year. Rabbi José says: "No agreement to buy manure can be made, unless the vendor has it ready for delivery"; the sages, however, allow it (20). One may stipulate (upon buying mer-

processes in order that they become suitable for delivery, they are considered in law to be in existence, and the sale is valid. If, however, they need undergo *three* processes, they are not considered to be in existence, and consequently cannot be made the subject-matter of a present sale. (This view is sustained by Maimonides, *Laws of Creditor and Debtor*, Chapter IX, Law 2). This is obviously well established in Jewish jurisprudence, that things which are not in existence at all have no potential existence in contemplation of law. Hence, things which are the natural product or expected increase of something already belonging to the vendor, as the offspring of animals, and future crops of land, although they have been planted before the contract is made or they are the spontaneous growth of the soil, may not be made the subject-matter of a present sale.

(20). The anonymous tanna permits a stipulation to be made for buying manure, at any season of the year even when the vendor has no manure in his possession. Rabbi José is of the opinion that such an agreement is invalid as usurious, unless the vendor is actually possessed of the manure. The view of the sages is that an chandise to be delivered thereafter in small quantities) to buy according to the price at the height of the market (*i. e.*, if the market price will decrease, the vendor shall have to deliver it at the lowest market price) (21). Rabbi Judah says: "Although no stipulation to that effect is made, the vendee may say to the vendor: 'Give me merchandise at such decreased price, or else return me the money (I advanced).'"

Mishnah VIII. A lessor may loan his tenants-on-shares wheat for sowing purposes to be returned in kind, but not wheat for consumption (22). (This rule of law was

agreement to buy manure cannot be distinguished from any ordinary agreement. They, therefore, maintain that in the summer, when manure can be obtained elsewhere, a sale of the aforesaid nature may be effected, but not in the winter season (*Gemara* 74a).

(21). The anonymous view prevails (Maimonides, *Commentary on the Mishnah*).

(22). Pursuant to the original terms of the lease to farm-let, the lessee was to furnish seed and farm the field, and in consideration of such letting, the lessor was either to receive a certain compensation of ready money or have a certain interest in the products of the field. If the lessee has no seed and fails to farm the field, the lease is thereby terminated; the lessor has laid down) because Rabban Gamaliel was accustomed to loan wheat to his tenants-on-shares for sowing purposes, but if thereafter the price of wheat has advanced or depreciated, he always took wheat from them at the lowest market price. It is to point out that Rabban Gamaliel's view was not law, but that he simply desired to place himself under greater restrictions.

the right of ousting the lessee, and the latter forfeits his rights obtained under the lease (*Gemara* 74b). If thereupon the lessor agrees to furnish the necessary seed, a new agreement has thereby been entered into between the respective parties, whereby it was agreed that the lessor should furnish the necessary seed, and that he should deduct the measure of seed from the lessee's share at harvest time (Rashi to *Gemara* 74b).

A loan of wheat to be returned in kind at some time in the future is prohibited (Mishnah IX, *infra*). In the case cited in this Mishnah, however, it is permitted because the wheat which the lessor is to receive at harvest time from the lessee's share is not considered as the payment of a loan of wheat made by him to the lessee. It is a right which has accrued to him by virtue of an express condition embodied in the agreement to farm-let, that the lessor should deduct the seed he had advanced from the share belonging to the lessee, and the latter should have so much less than any ordinary lessee who does furnish seed.

Mishnah IX. A man should not say to his neighbor: "Lend me a *kor* of wheat and I will return it to you at harvest time"; but he may say to him: "Lend it to me until my son comes home," or "until I find the key" (23); Hillel, however, forbids even this. And thus was Hillel accustomed to say: "A woman is not allowed to loan a loaf of bread to her neighbor, unless it is stipulated that the value thereof shall be paid (and not that a loaf of the same weight shall be returned), lest the value of wheat may rise and the transaction will turn out to be usurious" (24).

(23). When the borrower has no wheat in his possession, he may not effect a loan of a certain measure of wheat to be returned in kind at some time in the future, because the price of wheat may advance in the meantime, and when he returns wheat of the same measure, the lender will get usury for his loan. When, however, the borrower does have wheat in his possession, such a transaction is not usurious. It is considered as a mere exchange of merchandise, and title to the wheat in the borrower's possession passes to the lender immediately upon the formation of the agreement of barter. The aforesaid rule of law is well established.

(24). Hillel's view does not prevail (Maimonides, *Commentary on the Mishnah*).

Mishnah X. A man may say to his neighbor: "Help me a day in weeding, and in return I will help you in weeding on some other day; help me a day in hoeing, and I will help you some other day." But he may not say to him: "Help me a day in weeding, and I will help you a day in hoeing," or *vice versa* (25). All the days of the rainy season are considered alike, and all the days of the dry season are considered alike (26); but one may not say to his neighbor: "Help me a day in hoeing in the rainy season, and I will help you a day in hoeing in the dry season" (27). Rabban Gamaliel says: "There is a kind of usury which may be termed advanced, and another kind which may be termed postpaid; *e. g.*, one intends to borrow money from his neighbor, and he sends him a gift saying, 'This is sent to you because you will lend me some money'—this is usury in advance; if one has borrowed money from his neighbor, and when he pays the loan, he sends a gift to the lender saying, 'This is sent to you because your money was idle in my hands'—this is post-

---

(25). A performs a day's labor on B's field, and he does not get paid for the labor in ready money, but B in consideration thereof promises to perform a day's labor of similar nature on A's field. Such an agreement is permitted although it is probable that the kind of produce A will have to weed, or the kind of soil B will have to hoe in order to pay A for his labor, will require much more labor and skill, and consequently a day's labor performed by B will have been worth more than a day's labor performed by A. Since it is the same kind of labor, we do not stop to consider the difficulties it may involve, and therefore it is not prohibited as a usurious transaction.

When, however, the parties have to perform various sorts of labor, it is prohibited as usurious because the kind of work B will have to perform may be of greater value than the work performed by A.

(26). A day's work did not consist of a certain fixed amount of hours, but was generally work done from

---

sunrise to sunset. In the case mentioned in the text, it is likely that the day on which the promisor will have to perform his work may be much longer than the day on which the work was performed by the promisee, yet it is not taken into consideration since the days are of the same season.

(27). It is not permitted in this instance because the days in the dry season are much longer than in the rainy season. The promisee will consequently obtain more value in consideration of his agreement to wait for his wages due now. In all these cases it is prohibited because it is considered as a payment of a loan.

paid usury." Rabbi Simeon says that there is also a kind of usury which may consist of mere words, as when the debtor says to his creditor: "I inform you that such and such a person has arrived from such and such a place" (28).

Mishnah XI. The following persons transgress the negative commandments (relating to the taking of usury): the lender, the borrower, the surety, and the witnesses; and the sages include also the scribe. The above named violate the following commandments: " Thy money shalt thou not give him upon usury" (Lev. XXV, 37); " Thou shalt not take of him any usury" (*l. c.* 36); " Thou shalt not be to him as a lender of money" (Ex. XXII, 24); " Thou shalt not lay upon him any usury" (*l. c.*); and " Thou shalt not put a stumbling block before the blind; but thou shalt be afraid of thy God: I am the Lord" (Lev. XIX, 14).

---

(28). This is forbidden only when such information is given either by reason of a past loan, or in consideration of a future loan contemplated to be made, but no such information would have been given otherwise.

CHAPTER VI

CONTRACTS OF HIRING—LIABILITY OF PLEDGEES—REMOVAL OF BAILMENT BY BAILEE

Mishnah I. If one engages artisans and they deceive one another, they have nothing but mere resentment against each other (1).

(1). There is a diversity of opinion in the *Gemara* as to the true interpretation of the facts alluded to in the present Mishnah.

The *Gemara* 76a interprets the facts to mean that the controversy has arisen between the employer and the employees when the contract of employment had been effected through an agent of the employer, and explains the law in such cases to be this: When A appoints B as his agent for the purpose of procuring employees at the rate of four *zuzim* per day, and the latter obtains employees to work at the rate of three *zuzim* per day, the employees are entitled only to the rate of wages agreed upon by them. They cannot recover the fourth *zuz* which the employer was originally willing to pay either from the principal or his agent.

If one hires an ass-driver or a wagoner to bring litter carriers or pipers to a wedding or a funeral; or if one hires day laborers to take out flax from its steeping, or if he hires them to

If on the other hand A authorized B to procure employees at the rate of three *zuzim* per day, and the latter employed workmen to perform work for four *zuzim* per day, such employees can obtain a recovery of four *zuzim* from B if he did not disclose the principal when he had entered into the contract of employment. In the last named case, the employees have no remedy against the principal, because the agent, having exceeded the scope of the authority he was clothed with by the principal, thereby terminated his agency, and consequently his acts cannot bind the principal (Alfasi). If B disclosed the principal and made him a party to the agreement, the employees can recover from A only the *quantum meruit* on the principles of quasi contracts, because there was no contractual relation at all between A and the employees as A's agent did not act within the scope of his authority. A must, therefore, pay the employees at the rate of four *zuzim* per day if such is the reasonable value of the services they have rendered.

The *Gemara* 76a interprets the facts to mean that the contract of employment was entered into by the employer in person, and explains the law in such a case to be this: When A employs workmen to perform certain work at a certain fixed price per day, and either party to the agreement retracts, before the work perform work on materials of a perishable nature, and the latter retract, the employer may either hire other men at the expense of the workmen or deceive them, if there are no other workmen to be procured (for the price agreed upon) (2).

Mishnah II. If one hires mechanics (to perform certain work) and they retract, they are at a disadvantage; if the employer re-

was commenced by the employees, they have no legal remedy against each other. When, however, the employees are unable to procure employment elsewhere, A must then pay them for the entire day's wages (*Tosafot* to *Gemara* 76b). In such cases the damages are ascertained by making inquiries as to how much less a laborer would be willing to take per day when required to perform no work at all, than when he has to perform his usual labor (*Gemara* 76b).

(2). The employer may either hire laborers at a higher rate than the one agreed upon, and charge such increase to the employees, or he may promise the employees to raise their wages at the rate by them requested, and upon the completion of the work pay them only in accordance with the price originally agreed upon in the agreement (*Gemara* 76b). Such new promise is not enforcible at law, because it is supported by no consideration as the employees were already obligated to perform the work for the sum specified in the agreement.

tracts, he is at a disadvantage (3). Whosoever alters the terms of the agreement (4), or whosoever recedes (a contract) is at a disadvantage (5).

(3). A hires B to perform certain work at a stipulated price, say ten shekels, and B after performing one-half of the work retracts. If A thereupon procures other workmen to complete the work for seven shekels, he then has to pay B only three shekels and not half of the price stipulated. If on the other hand A procures workmen to complete the work for three shekels, he has to pay B five shekels only, half of the stipulated price. B cannot claim that since A obtained men to complete the work for three shekels, he is entitled to ten shekels minus the three shekels paid by A for completing the work.

If A retracts after half performance of the work by B, and thereafter he obtains men to complete the work for three shekels, he must then pay seven shekels to B. If he obtains workmen to complete the work for seven shekels, he must pay five shekels to A (Rashi to *Gemara* 75b).

(4). A gives wool to B to have it dyed red, and B dyes it black, if the wool by reason of such dyeing was improved to the extent of one shekel, and the expense incurred by B is half a shekel, A has to pay half a shekel only. If on the other hand the expenditure was only half a shekel and the improvement was a shekel, A pays only half a shekel (*Baba Kama* 100b).

(5). A sells his field to B for one thousand *zuz*, B giving two hundred *zuz* as security to A, and thereafter

Mishnah III. If one hires an ass for the purpose of driving it on a hill, and he drives it in a valley; or if he hires it for driving it in a valley and he drives on a hill, and the ass dies, the hirer is liable even when both ways are of equal distance (*e. g.*, ten miles) (6). If a man hires an ass and (during such hiring

A retracts. B has then a choice: he may either sue to recover the two hundred *zuz*, or have an action in specific performance to recover of the realty to the amount of the security. If B retracts, A has a choice: he may either return the two hundred *zuz* to B or compel him to take a part of the property, stipulated to be sold, to the value of the security (*Gemara* 77b).

This, however, is true only in a case where it was stipulated by the parties that title to the property should vest in the vendee upon the payment of the balance of eight hundred shekels. For, if it was expressly stipulated that title should pass immediately upon the giving of the part-payment, the sale would then be considered consummated and neither party could retract. In such a case, A would have the only remedy of instituting an action against B to recover the balance of the purchase price which is considered a mere debt, due from B to A (*l. c.*).

(6). This tanna is of the opinion that if the hirer does not act in accordance with terms of the agreement of hiring, he is liable in every case because he is guilty of conversion.

period) it gets blind or is seized for public service, the owner may say to the hirer: "Here is your property before you (take it in the condition in which it is)." If, however, the ass dies or is injured, the owner must furnish the hirer with another ass (7). If

(7). A hires an animal from B to perform certain labor therewith, and A does not designate any particular animal with which he is to perform such labor. Such an agreement is construed by the courts to import that B has obligated himself to furnish A with animal service for the length of time stipulated. If, therefore, B thereupon delivers an animal to A, although it is appropriate for the purpose of performing the work which the agreement calls for, he does not by such an act do everything on his part he is required to do under the terms of the agreement, because he must furnish A with animal service for the time stipulated. When, through no fault of A, the animal becomes utterly disabled from performing any labor, the owner is bound to furnish him with another animal (*Gemara* 79a). If B fails to furnish A with another animal, the latter is under no obligation to pay for the part of the work already performed by him (Maimonides, *Commentary on the Mishnah*). If A has paid B in advance for the services to be rendered, he can recover the same, because the contract is one entirety and part performance thereof on the part of B does not create any obligation upon the part of A.

When, however, A designates the animal he desires one hires an ass to drive it on a hill, and he has driven it in a valley instead and the ass has slipped, he is not liable (because this could surely occur on a hill); if, however, it was overheated, he is liable (because this could not happen on the hill where the air is much purer than in the valley). If the agreement was to drive it in a valley, and he drives on a hill (the law is then just the reverse): if it slipped, he is liable; if it was overheated he is not liable; if, however, the overheating was

to hire, and thereafter it becomes disabled from performing any work, B is not bound to provide the former with another animal. In this case, B, by delivering to the hirer the animal designated, has performed everything necessary on his part under the terms of the agreement (*Gemara* 79a; Maimonides, *Laws of Hiring*, Chapter v, Law 2). In this case, the hirer acquires a lien on the animal so hired. He may, therefore, sell the dead animal, and with the money realized therefrom he may either hire another animal or purchase one in order to complete his journey or services (*l. c.*).

In case no particular animal is designated by the hirer and the animal does not become utterly disabled, as when it gets blind or lame and the work to be done under the agreement is possible of being performed but with some difficulty, the owner is not bound to provide the hirer with another animal.

caused by reason of the ascent to the hill, he is liable (8).

Mishnah IV. If one hires a cow (with the implements belonging to it) for the purpose of ploughing therewith on a hill and he has ploughed in a valley, he is not liable in case the plough-share was broken. If he hires it to plough therewith in a valley and he has ploughed on a hill, he is liable in case the plough-share was broken (9). If he hires it for the purpose of threshing pulse and he has threshed grain (and the animal has slipped by reason of which it was injured), he is not liable; if to thresh grain and he has threshed pulse (and it slipped), he is liable

---

(8). This tanna is of the opinion that even in cases where the hirer does not act according to the terms of his agreement he is not liable, unless it is evident that the incident which has caused the injuries to the animal could not have occurred if the hirer would have complied, and acted in accordance, with the terms of the contract of hiring entered into between the parties. His view is the prevailing law.

(9). The soil on a hill is generally much more rocky than in a valley, and therefore the plough-share is more apt of being broken than in a valley.

(because pulse is more slippery than grain) (10).

Mishnah V. If one hires an ass for carrying a certain *weight* of wheat, and he has carried the same weight of barley, and the animal sustained some injury (by reason of the burden it carried), he is liable; if for carrying grain and he has carried straw of the same weight, he is liable because an increase of volume is as hard for the animal as an increase of weight. If he hires it to bring a *lethekh* (half a *kor*) of wheat and he has brought a *lethekh* of barley, he is not liable, but if he increased the measure (although it was equal in weight to the measure of wheat), he is liable. With how much shall the hirer increase the load, in order to be held liable? Symmachos in the name of Rabbi Meïr says: "One *seah* for a camel and three *cabim* for an ass."

---

(10). The view of this tanna is in accord with the opinion of the tanna in the previous Mishnah (note 8, *supra*), that even when the hirer does not act according to the terms of the agreement he is not liable, unless it is obvious that the accident could not happen if he acted within the scope of his authority.

Mishnah VI. All artisans are considered as bailees for hire (11). If, however, they say (to the owner upon the completion of the work performed by them): "Take your article and pay us thereafter for the work by us performed," they are then considered as gratuitous bailees (12).

If one says to his neighbor: "Guard this article for me, and I will reciprocate such service to you," the depositary is in such a case a bailee for hire. If one says to another: "Guard this article for me," and in reply thereto such person says: "Place it in my presence," he is in such a case considered a gratuitous bailee (13).

---

(11). An artisan is considered a bailee for hire, because he acquires a lien on the article to the value of his services rendered. By virtue of such lien, he may retain the article until his claim for the work performed thereon is satisfied by the owner (*Gemara* 80b).

(12). When, however, the artisan does not desire to avail himself of the privilege granted to him by law, and expressly notifies the owner that he does not care to enforce such lien, he is then considered a gratuitous bailee only.

(13). A says to B: "Guard this article for me," and B in reply thereto says: "Place it in my pres-

Mishnah VII. If one lends money and takes a pledge from the creditor to secure the payment of such loan, he is considered a bailee for hire (in taking care of the pledge). Rabbi Judah says: "If he lends *money* (and takes a pledge), he is a gratuitous bailee; if he loans fruit, he is a bailee for hire" (14). Abba

ence," such an answer is considered in law as an acceptance of A's offer. There consequently was a meeting of the minds of the parties to make it a binding agreement for a gratuitous bailment, although B did not expressly say that he would take care of the article. When, however, B replies: "Place it before you," or "Place it," but does not say "In my presence," this does not constitute an acceptance of A's offer (*Gemara* 81b; sustained by Alfasi and Maimonides, *Laws of Hiring*, Chapter II, Law 8).

(14). Rabbi Judah holds that when a man lends money to some one else and takes a pledge to secure the payment of such loan, he is in no way benefited by the transaction and consequently cannot be held liable as a bailee for hire.

In the case of an artisan (Mishnah VI, *supra*), he is considered a bailee for hire by virtue of the lien he acquires, because he is benefited by the transaction in that an opportunity was given him by the owner of the article to render services and earn some money, in priority to other artisans (*Tosafot* to *Gemara* 80b).

When, however, A loans fruit to B on a pledge, with the understanding that the latter shall return fruit to

Saul says: "A pledgee may let out a pledge of a poor person, and the money thus realized shall be deducted from the sum due, because this is equivalent to the restoration of a lost article to its owner" (15).

Mishnah VIII. If a bailee carries a cask

the value loaned, some time in the future, A in such a case is held liable as a bailee for hire. The consideration received by A in this case is that he is relieved in the meantime from taking care of the fruit and storing it so that it might not become decayed in course of time.

The view of Rabbi Judah is not sustained by authority. The prevailing opinion is that a pledgee is held liable as a bailee for hire in every instance. The reason for such liability, as stated in the Talmud and sustained by Alfasi and Rashi, is that every person is bound by the Mosaic Law to lend money to a needy person. When one is actually engaged in performing a religious duty, he is exonerated from performing another one at one and the same time. For the privilege, therefore, that the pledgee has, in that he is exonerated from giving alms to the poor while he is actually engaged in taking care of the pledge, he is considered a bailee for hire.

(15). The opinion of Abba Saul is sustained by weight of authority. This, however, holds true only when the damage done to the pledge by reason of such letting does not exceed the profits realized (*Gemara* 82b; Alfasi and Maimonides, *Laws of Creditor and Debtor*, Chapter III, Law 8).

from one place to another and breaks it, whether he is a gratuitous bailee or a bailee for hire, he must take an oath (to the effect that he was free from negligence) and is exempt from liability (16). Said Rabbi Eliezer: "I have also heard that in both cases the bailee has to take an oath and be exempt from liability, but I was wondering how such a decision could be upheld" (17).

(16). It cannot be called gross negligence when a bailee, while removing the bailment from one place to another, stumbles over a certain object by reason of which stumbling he falls and breaks such bailment. Neither can such an occurrence be termed *compulsion* or *overpowering force*, but is analogous to that degree of negligence which ordinarily causes *theft* and *loss*. (*Vide* note 12 to Chapter VII, *infra*). The anonymous opinion is that a bailee for hire, as well as a gratuitous bailee, has to take an oath to the effect that he was not guilty of gross negligence in carrying such bailment, and that this particular stumbling was occasioned by reason of the ordinary cause which generally occasions other incidents of stumbling and is then exempt from liability. This tanna follows the opinion of the sages (*Baba Kama* 28b), and is sustained by Alfasi and Maimonides. (For the reason why a bailee for hire may, in this particular instance, be exempt from liability with an oath, see note 17, *infra*).

(17). The anonymous view of this Mishnah cannot be upheld on strict principles of bailment. The law is well established that a bailee for hire is liable in cases where he is guilty of an ordinary neglect of duty. He should, therefore, be held liable in cases of stumbling, even when it was caused by an ordinary degree of negligence. This view, however, can be sustained on the ground that if a bailee for hire would be held liable in cases of stumbling, he would never take the risk to remove a bailment even when absolutely necessary. In this particular instance, therefore, the Rabbis have modified the Law of Moses, and have enacted that a bailee for hire should be exempt from liability by taking an oath that he was free from gross negligence (*Gemara* 83a; sustained by Alfasi and Maimonides, *Laws of Hiring*, Chapter II, Law 3).

CHAPTER VII

HIRING OF LABORERS—THE FOUR BAILMENTS—CONDITIONS

Mishnah I. If a man engages workmen and asks them to work in early morning or in late evening, at a place where early morning work or late evening work is not customary, he cannot compel them (to do so) (1); where it is customary to furnish them with food, he must do so; if it is customary to provide them with sweets, he must do so—all depends upon the custom of the province.

---

(1). When one hires laborers and does not expressly state in the agreement of hiring how many hours per day they will have to work, it is then implied in law that the parties to the agreement were willing to abide by the custom of the locality. The employer cannot compel the workmen to work longer hours than is customary in that locality, even when he has agreed to pay them more than the rate of wages generally paid to such laborers. It is implied in law that he has agreed to give them such an increase with the view of having them perform better work, and not for the purpose of having them work longer hours than is customary (*Gemara* 83a; Maimonides, *Laws of Hiring*, Chapter IX, Law 1).

It is related of Rabbi Johanan ben Mattai that he said to his son: "Go out and engage workmen for us." The latter did so, and agreed with the employees that they should be provided with food. When he came back to his father, the latter said: "My son, even if you should provide them with a banquet equal to that of Solomon's during his reign, you would not be certain that you have discharged your duty, as they are the children of Abraham, Isaac and Jacob. Before they begin to work, go and say to them: '(You are to work) on the express condition that I should have to provide you with bread and pulse only.'" said Rabban Simeon ben Gamaliel: "He did not have to make such a condition, because (in the absence of an express provision to the contrary) everything must be done (by the employer) according to the custom of the province."

Mishnah II. The following (laborers) are entitled, according to the Law of Moses, to eat (from the fruit they are handling): He who works on what is affixed to the ground, when the finishing touch to the work is given (*i. e.*, when severing it from the soil); and he who works on what is detached from the ground, when the finishing touch to the work has not been given (2), and is the product of the soil (3). The following (laborers) may not partake: He who works on what is affixed to the ground, when the finishing touch to the work is not given; and he who works on what is detached from the soil, when the finishing touch to the work is given, or when it is not the product of the soil.

Mishnah III. If the workman performs work with his hands and not with his feet, with his feet and not with his hands, or even when he works with his shoulder only, he is entitled to eat (from the fruit he is handling). Rabbi José ben Rabbi Judah says: "A laborer is entitled to eat only when he employs both his hands and his feet in the work" (4).

---

(2). When products of the soil are in that state of development in which the tithe for the Levite or the heave-offering for the Priest must be separated, no one is allowed to partake therefrom, unless the tithe or the heave-offering has either actually been given to the Levite or the Priest or has at least been separated from the mass and set aside for him.

(3). But those engaged in milking or cheese-making, for instance, do not eat of the produce they are handling.

Mishnah IV. He whose work is among figs is not permitted to eat grapes; among grapes, is not allowed to eat figs. He may, however, refrain from eating until he reaches the place where the finest fruit is found. In all cases it is said that a laborer may eat only when he is actually engaged with his labor, but in order to restore a lost article to its owner (*i. e.*, to save the time of the employer), it was enacted that he may eat only while going from one furrow to the other, or while returning from the wine-press. An ass is entitled to eat (from the burden it carries) while being unladen (5).

---

(4). The law in such cases is that the *labor* of a workman entitles him to partake of the fruit with which he is engaged, and it is absolutely immaterial with which member of his body he performs such work. The view of Rabbi José, therefore, does not prevail (Maimonides, *Commentary on the Mishnah*).

(5). As explained in the *Gemara* 92a, the interpre-

Mishnah V. The laborer may eat cucumbers or dates even to the value of a *denar.* Rabbi Eleazar ben Hisma says: "A laborer must not eat fruit the value of which exceeds his wages." The sages allow even this; nevertheless, we teach a man not to be greedy so that the doors of mankind should not be closed against him (6).

Mishnah VI. One may stipulate on his own behalf, on behalf of his son or daughter who is of age, on behalf of his man-servant or maid-servant who is of age, and on behalf of his wife, because they have understanding (7). He may not stipulate on behalf of his minor

---

tation of this rule of law is that an ass is entitled to eat from the burden it carries *until* it is being unladen.

(6). The view of the sages is that a laborer is legally entitled to eat more than his wages amount to, but that he is ethically enjoined from doing so. Their opinion is the prevailing law (Maimonides, *Laws of Hiring*, Chapter XII, Law 11).

(7). A laborer may stipulate either on his own behalf or on behalf of those enumerated herein, that he or they shall not eat of the fruit they are entitled to according to law, and take money instead, for the reason that they have understanding and are therefore capable of waiving such right.

son or daughter, of his minor man-servant or maid-servant, nor of his cattle, because these have no understanding (8).

Mishnah VII. If one engages workmen to work on fruit of a plantation in its fourth year (9), they are not permitted to eat therefrom. If, however, he did not notify them (of the case), he must redeem the fruit in order to enable them to eat therefrom (10). If a man's fig-cakes were broken (and he hired laborers to re-press them), or his sealed casks were opened (and he engaged workmen to have them sealed again), they are not permitted to partake therefrom (*vide* note 2, *supra*); but if he did not notify them, he must separate the tithe for the Levite, and thus enable them to eat therefrom.

---

(8). Those enumerated herein have no understanding to waive the right given them to partake of the fruit with which they are engaged, and therefore no stipulation to that effect may be made for them (Maimonides, *Commentary on the Mishnah*).

(9). *Vide* note 20, to Chapter IV, *supra*.

(10). Unless agreed upon to the contrary, the laborers as a matter of law are entitled to partake from the fruit with which they are engaged. When, therefore, one hires laborers, there is an implied provision that they shall partake from the fruit they are handling, and such a right forms a part of the consideration they are to receive for their labor. If, for some reason or another, such fruit may not be consumed and the employer has not notified the laborers of the existing prohibition, the employer is bound, by virtue of the agreement, to remedy such prohibition if it is remediable.

Those that watch crops are permitted to eat (from the crops they watch) by the custom of the land, but not according to the Law of the Scripture (11).

Mishnah VIII. There are four kinds of bailees: A gratuitous bailee, a borrower, a bailee for hire, and a hirer. A gratuitous bailee takes an oath in every case; a borrower must pay in every case; and a bailee for hire and a hirer have to take an oath concerning an injured or confiscated animal, but they have to pay in cases of theft or loss (12).

(11). According to the Law of the Scripture, only such laborers as directly perform some labor on the produce are entitled to partake therefrom, but a watchman who performs no work on the produce is not entitled to partake.

(12). In order to thoroughly comprehend the various liabilities of bailees, the three main classes, into which the Jewish law divides occurrences with respect

Mishnah IX. (The attack of) one wolf does not constitute an overpowering force, but of two wolves it does. Rabbi Judah maintains that at the time when wolves are

to their nature or degree of negligence, must be understood at the outset.

Occurrences are divided into *transgression*, *theft* and *loss*, and *compulsion*. *Transgression*, or *gross negligence*, is where the happening of the occurrence was the result of such a degree of negligence on the part of the bailee as would in law be tantamount to an intentional destruction of the bailment. *Theft* and *loss*, or *ordinary negligence*, is where the occurrence has resulted from an ordinary degree of negligence on the part of the bailee, generally accompanying cases of theft and loss, in that he has not taken ordinary care. *Compulsion*, or *overpowering force*, is an occurrence which was the result of such a force or power as could not have been avoided or resisted had even the greatest degree of care or precaution been taken by the bailee.

There are four kinds of bailments: 1. *Depositum gratis;* 2. *Depositum compensatis;* 3. *Locatio rei;* and 4. *Commodatum*.

1. *Depositum gratis*, or a gratuitous bailment, is a bailment of goods to be kept by the bailee for the bailor, *without recompense*, and to be returned either on demand or at a certain fixed time. Such a bailee is to keep the goods bailed with reasonable care, and is *liable* only for *gross neglect*, or the want of care which every prudent sensible man would, under the circumstances, take of his own property. In other words, he

coming in hordes, (the attack of) even one wolf constitutes an overpowering force; (his view does not prevail; Maimonides, *Commentary on the Mishnah*). (The attack of) two dogs is

is liable only for such a degree of negligence as would in law be classed under *transgression*.

In case the bailee is unable to return the bailment to the bailor, there is a *prima facie* case of neglect of duty on the part of the bailee. If the bailee claims that the bailment was either stolen or lost, or that any other occurrence, which partakes the character of *theft* and *loss*, has caused the destruction of the bailment, and that it was not caused by his gross neglect, he must then take an oath to substantiate his defense. The oath rebuts the *prima facie* case, and no more evidence need be produced by the bailee in order to be exempt from liability.

2. *Depositum compensatis*, or a bailment for hire, is where the bailee is to keep the goods for the bailor, receiving compensation therefor, and restore the same either on demand or at a certain fixed time. He is liable in cases of *ordinary neglect*, such as resemble *theft* and *loss*, and is not liable in cases of *compulsion* or *overpowering force*. When he is unable to return the bailment to the bailor and his defense is that it was destroyed as a result of an overpowering force, he must take an oath to substantiate his defense.

3. *Locatio rei*, or letting of a thing, is where a man, for a certain compensation, gains the temporary use of a certain article. His liability is exactly analogous to that of a bailee for hire.

not considered an overpowering force. Jaddua the Babylonian in the name of Rabbi Meïr says: "(The attack of) two dogs, coming from the same direction, does not constitute an overpowering force; but when coming from two different directions it does;" (not law; Maimonides, *Commentary on the Mishnah*). (The attack of an armed) robber, a lion, a

---

4. *Commodatum*, or a loan, is the bailment of an article for a certain time, to be used by the borrower *without paying* for its use. Here, because the bailee is the only party benefited by the transaction, he is held to the highest degree of care and is liable in every instance.

The only case where a borrower is not liable is either where the owner of the bailment was employed by the borrower when the loan was effected (Chapter VIII, Mishnah I, *infra*), or where the destruction of the bailment has resulted from the very kind of work for which it had been borrowed, provided it had not been tasked beyond its strength (*Gemara* 96b).

It is, however, to be understood that when it is said in such cases that the bailee's oath suffices to exempt him from liability, it is only when it is evident that no witnesses can be procured by him to corroborate his defense. But when it appears that witnesses can be procured by him, he cannot establish his defense with an oath (*Gemara* 83a; Alfasi; Maimonides, *Laws of Hiring*, Chapter III, Law 2).

bear, a tiger, a panther or a serpent is considered an overpowering force. This, however, is true only when it comes unexpectedly of its own accord, but if the bailee takes his flock to a place where there are hordes of noxious beasts or robbers, it is then not considered an overpowering force. A natural death constitutes an overpowering force, but not if death is caused by ill-treatment (starvation). If the beast has climbed up to the top of a peak and has fallen down, which fall has resulted in its death, this is considered an overpowering force; but if the bailee has led it up to the top of a peak and it has fallen down, as a result of which fall it has died, such an occurrence is not considered an overpowering force.

Mishnah X. A gratuitous bailee may make a condition (in his agreement of bailment) that he shall be exempt from taking the oath (of exoneration, when he claims that the bailment was either stolen or lost); a borrower may make a condition that he shall be exempt from payment; and a bailee for hire and a hirer may make a condition that they shall be exempt from payment and also from taking the oath.

Mishnah XI. If one makes a stipulation, the terms of which are contrary to that which is written in the Pentateuch, his stipulation is void (13). Every condition which is preceded by the act (which the promisor obligates himself to do by virtue of his promise), is void (14). Every act, which is possible of

(13). The law regarding the illegality of contracts when they are contrary to the Law of Moses is, that if the effect of the agreement is to deprive one of the contracting parties from a pecuniary interest or benefit given to him by law, it is valid and obligatory. When a contract involves a violation of a moral, religious or criminal law it is void and therefore not obligatory. (View of Rabbi Judah, *Kidushin* 19b). The anonymous decision of Mishnah X is therefore the prevailing law. The ruling in this Mishnah follows the view of Rabbi Meïr (*l. c.*) and does not prevail.

(14). The language of this Mishnah is somewhat ambiguous, and consequently there arose a diversity of opinion as to the true interpretation thereof.

Rashi and many other jurists have explained this Mishnah to mean, that every condition which the promisor, upon making his promise, desires to impose upon the promisee, and upon the performance of which the fulfillment of his promise is to depend, must be made by him precedent to the making of his promise.

being performed is valid when embodied

If the condition is made subsequent to the making of his promise or at the conclusion of the agreement, it is then invalid and consequently not obligatory upon the promisee.

According to this view, a condition is *precedent* when it is made by the promisor prior to the making of his promise. Such a condition is then valid and binding so that the promisor is not bound to fulfill his promise before the promisee has performed the condition. A condition is *subsequent* when it is made by the promisor after the making of his promise. Such a condition is then invalid, and the promisor must fulfill his promise whether the promisee performs the condition or not.

The above named commentators have elicited the aforesaid distinction of conditions from the Scripture. When the two and a half tribes were desirous of settling in the land conquered by Moses on the east of the Jordan, Moses, in imposing a condition to their taking possession thereof, said to them: "If you will pass armed with your brethren across the Jordan and help them fight with the nations who inhabit the west of the Jordan, then you shall have this land." They, therefore, explain this Mishnah to mean, that every condition, in order to be valid as such, must be made by the promisor prior to the making of his promise, as had been made by Moses.

This distinction of conditions, although seemingly arbitrary, is supported by good reason. A contract is created by a meeting of the minds of the parties thereto, and if at some moment their minds meet, the in an agreement as a condition, if such

contract is thereby made and cannot thereafter be defeated by the will of only one of the contracting parties. When, therefore, one makes a promise, supported by a valid consideration moving from the promisee, the agreement is at that point considered consummated. If there is no condition made by the promisor prior to the making of his promise, it is presumed in law that his intention was to make it absolute and unconditional. At that moment, when the promise was concluded by the promisor, the minds of the parties have met, and consequently there was a contractual relation. If the promisor, immediately after the making of his promise, makes a condition upon which the fulfillment of his promise is to depend, such a condition is considered a mere after-thought and is consequently invalid.

Maimonides in his *Commentary on the Mishnah* and several other commentators are of the opinion that the manner or mode in which the promisor expresses his promise is absolutely of no moment. They maintain that the present Mishnah, in drawing a distinction between conditions precedent and subsequent, means this: If the promisor actually performs the act he obligates himself to do by virtue of his promise, before he has made the condition he desired to impose, such a condition is then termed *subsequent* and is of no effect. When, however, the promisor does not actually perform the act he obligates himself to do under his promise, but is in abeyance until the promisee will perform the condition, such a condition is then termed *precedent*, and is consequently valid and binding upon an act was made a condition precedent (15).

the promisee. In other words, according to the latter interpretation, a condition is precedent and consequently binding upon the promisee when it is made for the purpose of preventing a right or an obligation from being created. A condition is subsequent and consequently not binding, when it is made for the purpose of defeating a right or an obligation which has already come into existence.

It is to be understood that when it is said that a condition is invalid, it is meant thereby that the promisor must fulfill his promise whether the condition is performed or not.

(15). A condition in order to be valid must consist of an act which is possible of being performed by the promisee. If the promisor names an act as a condition which is absolutely impossible of being performed, it is of no effect, because it is presumed that the promisor was insincere in imposing such a condition (*Gemara* 94a; Alfasi and Maimonides, *Commentary on the Mishnah*).

CHAPTER VIII

BORROWING OF ANIMALS—EVIDENCE—OWNERSHIP IN TREES AND NOT IN THE SOIL—LANDLORD AND TENANT

Mishnah I. One borrows a cow, and at the same time engages to employ its owner either gratis or for hire; or he first engages the owner and subsequently borrows the cow. If the cow dies while in his custody, he is not liable, as it is written (Ex. XXII, 13): "If the owner be with him (the borrower), he shall not pay." If, however, he first borrows the cow and thereafter he employs its owner either gratis or for hire, and the cow dies, he is liable, as it is written (*l. c.* 14): "If the owner be not with him, he shall surely pay" (1).

---

(1). The present Mishnah explains the law of the Scripture (*l. c.* 13–14) to be this, that, in order that

Mishnah II. One borrows a cow for half a day and hires her for half a day; or he borrows her for one day and hires her for another day (and she dies); or he borrows one cow and hires another and one of them dies. The bailor says: "It is the borrowed cow that died (and consequently the bailee as a borrower is liable in cases of death); she died on the day she was loaned, she died at the time of the day she was loaned." The bailee says: "I do not know (when she died);" he is liable (2).

the borrower should be exempt from liability, it is essential that the bailor should be in his employ at the time the loan is effected; but that it is not at all necessary that the bailor should be employed by the borrower at the time the accident, causing the destruction of the bailment, occurs (*Gemara* 95b; Alfasi; Maimonides, *Laws of Loan and Bailment*, Chapter II, Law I.)

(2). It is a well established rule of law in Jewish jurisprudence that when A makes a positive assertion that B is indebted to him in a certain sum of money, and B says that he is uncertain whether he is indebted or not, then A is not entitled to a recovery of his claim if he is unable to produce any evidence in support of his complaint. (View of Rabbi Nachman and Rabbi Johanan, *Kethuboth* 12b; Maimonides, *Laws of Pleading*, Chapter I, Law 7).

The rule of law laid down in the present Mishnah

If on the other hand, the hirer says: "It is the hired cow that died (and consequently as a bailee for hire he is not liable in cases of death); she died on the day when I used her for hire;

is apparently in conflict with the above named rule of law, for it says that the bailor is entitled to a recovery upon his mere statement, if the claim made by him is certain and the defense made by the bailee is uncertain. The *Gemara* 97b–98a, however, reconciles the ruling of this Mishnah with the above mentioned rule of law on the theory stated hereinafter.

This is likewise a well established rule of law that when A claims one hundred shekels from B, and B admits a part of such liability, say fifty shekels, he must then pay the fifty shekels which he has admitted, and take an oath that he does not owe the balance claimed by A. (*Vide* note 13 to Chapter IV, *supra*.) When, however, B, by the nature of his defense, has incapacitated himself from taking an oath to the effect that he does not owe the balance of the debt claimed by A, as for instance when he admits fifty shekels and as to the other fifty he is uncertain whether he owes it or not, he must then pay the entire sum claimed by A (*Gemara* 98a).

The *Gemara* (*l. c.*) says that in the first two cases mentioned in the text, the facts are as follows: The bailor says to the bailee: "I have given you two cows, both of which were loaned by you for one half of the day and hired for the other half of the day;" or he says: "Both of them were loaned by you for one day and she died at the time of the day when I used her for hire," and the bailor says: "I do not know," the former is not liable (3). If the bailor claims that the loaned cow died, and the bailee claims that the hired one died, the latter must take an oath that the hired one died

hired for the following day, and both of them have died at the time or on the day they have been loaned." The borrower on the other hand says: "I admit that one of these cows has died at the time or on the day she was loaned, but as to the other cow, I do not know when she has died." In the third case cited in the text, the bailor says: "I have given you three cows, two of which were loaned and the third one was hired by you, and the two cows which were loaned have died." The bailee in reply says: "I admit that one of the two dead cows is one of the two I loaned from you, but as to the other dead cow, I do not know whether it is the one that was loaned or the one that was hired." As the bailee admits a part of the liability, which admission casts upon him the burden of taking an oath to the effect that the other cow which has died was the hired one, and as he is unable to take an oath to that effect because he admits that he does not know it, he must pay for it.

(3). The bailee is not liable in this case, because the bailor, who is the party plaintiff, by making a doubtful assertion of his claim, admits that he is unable to prove his case and fix any liability upon the bailee.

(and is exempt from liability) (4). If the

---

(4). The *Gemara* 98b says that it fails to see the theory upon which this rule of law can be sustained, as there is nothing to appear from the facts, as stated in the text, to warrant the imposing of an oath upon the bailee. For, it is a well established rule of law that, when both parties to an action make positive assertions in support of the claim or of the denial thereof, the defendant does not then have to take an oath to substantiate his defense, if the claim made by the plaintiff is not supported by a presumption. For instance, when A says to B: "You are indebted to me in the sum of one hundred shekels," and B says: "I owe you nothing," it is then for the plaintiff to come forward with evidence to prove his claim, and not for the defendant to prove his defense.

This is likewise well established, that the burden of an oath is cast upon the defendant when he admits a part of the liability, only when the admission is made for a part of the very claim made by the plaintiff. No oath can be imposed upon him when he admits a liability which differs entirely from the one the plaintiff seeks to establish. When, therefore, A claims that B owes him ten measures of wheat, and B admits that he owes him five measures of barley, this does not constitute a part admission which should cast upon the defendant the burden of taking an oath, because such an admission does not raise the presumption of the existence of the claim made by A (*Shebuoth* 38b).

In the case as presented in the text, where the bailor claims that the loaned cow has died and the bailor says: "I do not know," and the bailee likewise says: "I do not know," then both

bailee claims that the hired one has died, the latter thereby admits a liability which necessitates his taking an oath to the effect that the cow has *died a natural death.* Nevertheless such an admission does not constitute a part of the claim made by the bailor, because the liability admitted by the bailee is entirely distinct from the liability sought to be established by the bailor: the latter seeks to hold the former liable in *damages* as a borrower, while the former admits that he must take an oath in the capacity of hirer. Such an admission, consequently, does not necessitate the bailee's taking an oath to the effect that it was the *hired* cow which has died, or that it has died on the day or at the time it was hired.

The *Gemara* (*l. c.*), however, sustains the ruling of this Mishnah on the theory known in Jewish jurisprudence as the *oath of adherence* ("Gilgul Shebuah"). *I. e.*, if the defendant to an action seeks to establish a certain fact, which is to constitute his defense and for which he must take an oath to substantiate the same, and the plaintiff seizes the opportunity to confront him with another claim, upon which, had it been made separately, no oath would have been taken, the second claim is *adhered* to the first, and the defendant must take an oath for the second claim in connection with the first. As in the case cited in the text, when the bailee contends that the hired cow has died a *natural death*, he must take an oath to substantiate such contention. (*Vide* Chapter VII, Mishnah VIII, *supra.*) When, therefore, the bailor parties have to suffer the damage in equal proportions (5).

Mishnah III. One loans a cow, and the owner sends it to the borrower by his son, slave or messenger; or by the borrower's son, slave or messenger (6). If the cow dies (on

claims that it was the loaned cow which has died, the bailee must embody in his oath that it was the *hired cow* which has died a *natural death*, although for the fact that it was the *hired cow* no oath would have to be taken by him otherwise (Alfasi; Maimonides, *Laws of Loan and Bailment*, Chapter III, Law 3).

(5). This view does not prevail, because on principles of evidence the plaintiff has the burden of proving his case in every instance. When, therefore, both litigants are uncertain as to the liability, no money can be extorted from the defendant and given to the plaintiff, by reason of a mere doubtful claim made by the latter.

(6). If the borrower appoints an agent for the purpose of bringing the cow from the hirer, his liability as a borrower commences from the moment the cow has come into the possession of such agent. The ruling of this Mishnah is explained in the *Gemara* (*Baba Kama* 104a), that the borrower has never authorized the messenger to bring the cow in question to him; but that such person was in the employ of the borrower at that time, and the owner, on the strength of such employment, has sent the cow by him. The borrower, therefore, is not liable as its way) the borrower is not liable (7). If, however, the borrower has said to the owner: "Send it to me by my son, slave or messenger; or by your son, slave or messenger;" or in case the owner has said to the borrower: "I will send it to you by my son, slave or messenger," and the borrower said: "Do so," and the owner has sent the cow accordingly and it has died (on its way), the borrower is liable. The same law is applicable to the return of the bailment (8).

Mishnah IV. One exchanges a cow for an

---

such from the time the cow has come into the possession of the messenger.

(7). The liability of a borrower as such begins from the time the bailment actually comes into his possession, but not before then (*Gemara* 99a; Maimonides, *Laws of Loan and Bailment*, Chapter III, Law 2).

(8). If the borrower returns the animal before the expiration of the term for which it was loaned, he is held liable as a borrower until it is actually brought back into the possession of the bailor. If, however, he returns the bailment after the term for which it was loaned has expired, his position is then changed from that of a borrower into that of a bailee for hire, and he is liable only in cases of ordinary neglect (*Gemara* 80b–81a; Alfasi and Maimonides, *Laws of Loan and Bailment*, Chapter III, Law 2).

ass, and the cow brings forth young ones; or one sells his female slave and she gives birth to a child. The vendor claims that this has happened before the sale had been consummated, and the vendee claims that it has happened thereafter, the value of such offspring is to be divided equally between the parties (9). One is possessed of two male-

---

(9). This decision is wrong on principles of evidence. The law is well established that the defendant is in every instance favored with the presumption of possession. In cases, therefore, where there exists a doubtful question of fact, and no evidence is possible of being produced by either party to the controversy to clear up such doubt, it is then the defendant that is benefited by the existing doubt.

In the case mentioned in the text, the question for the court to decide is whether the birth has taken place before or after title had passed to the vendee. When there is no evidence produced by either party whereby such doubtful question can be cleared up, the law is then this: If the cow or the maid-servant was, at the time the agreement was made, in the possession of one of the parties, and the adverse party seeks to establish a right of ownership in him, the latter, as party plaintiff, can obtain no recovery of his claim, because he is unable to prove his case by a fair preponderance of evidence. If the cow or the maid-slave was then in the possession of neither party to the action, but was in common or public grounds slaves, a large and a small one; or he is possessed of two fields, a large one and a small one (and he has entered into an agreement with a certain party to sell him one of his slaves or one of his fields). The vendor then says that he has sold the small one, and the vendee says that he does not know (which of the slaves or of the fields was meant to be sold by the agreement), the latter gets title to the small one. If the vendee says that he has bought the large one and the vendor says that he does not know, the former gets title to the large one. If the vendor says that he has sold the small one and the vendee says that he has bought the large one, the vendor shall take an oath that he has intended to sell the small one (and the vendee gets title to the small one). If the vendor says that he does not know and the vendee likewise says that he does not know,

when such question has arisen, the vendor, as the first owner, is then favored with the presumption of preëmption. The burden of proof is cast upon the vendee who is, by reason of the presumption raised in law in favor of the vendor, considered the plaintiff in the controversy (*Gemara* 100a; Alfasi and Maimonides, *Laws of Sales*, Chapter IV, Law 10).

the difference (of value between the two slaves or fields) is to be divided between them.

Mishnah V. If one sells his olive-trees for fuel, and (before they are removed by the vendee) they produce some olives, the oil of which is less than one-quarter of a *lug* from the measure of a *seah*, they belong to the vendee. If the olives produce more than a *lug* (of oil) from one *seah*, and the vendee claims that his trees have produced them, while the vendor claims that his soil has produced them, they are to be divided between the parties (10).

(10). A sells his trees to B for fuel, and it is agreed by the parties that the trees shall immediately be removed by the vendee. B, notwithstanding such an agreement, allows the trees to remain there for some length of time. If the trees in the meantime have produced some olives, they belong to the vendor no matter how trivial their value may be. If, on the other hand, it has been agreed by the parties that the trees should remain attached to the soil for a certain time, or that they should be removed by the vendee whenever he sees fit, and before such removal is made they produce some olives, they belong to B irrespective of their pecuniary value. In the Mishnah now under discussion, no express agreement has been made as to when the trees should be removed by the vendee. When, therefore, the olives are of slight value, it is

If a stream carries off one's olive-trees and deposits them in a neighbor's field (where they have produced some olives), and the owner of the field says: "My trees have produced them," while the owner of the soil says: "My soil has produced them," the olives are to be divided equally between both parties.

Mishnah VI. The lessor cannot dispossess the tenant during the entire rainy season, from the Feast of Tabernacles until Passover (*i. e.*, six months) (11); in the summer, for a period

implied that the owner of the soil has abandoned them. If, however, they are of considerable value, they have to be divided between the parties (*Gemara* 100b; Alfasi and Maimonides, *Laws of Adjacent Owners*, Chapter IV, Law 11).

(11). When one leases a house for a monthly rental, not specifying when the term of such lease is to expire, the landlord cannot dispossess the tenant during the six rainy months, unless he gives notice to the tenant, thirty days before the rainy season sets in, that he desires to terminate the tenancy or that he desires to raise the rental. If no such notice is given, the tenant has a right to continue occupying the premises during the entire rainy season under the original terms of the lease, because in the rainy season it was extremely difficult to obtain vacant premises. The tenant likewise must give notice to the landlord of his intention to terminate his tenancy, thirty days before of thirty days (12); in large cities, for twelve months whether in the rainy season or in the summer (13); in the case of shops, for twelve months whether in small towns or in large cities (14). Rabban Simeon ben Gamaliel says: "The term for shops of bakers and dyers is three years" (15).

Mishnah VII. If one rents a house to his

the rainy season sets in (*Gemara* 101b; Alfasi and Maimonides, *Laws of Hiring*, Chapter VI, Laws 7–8).

The landlord may, however, raise the rental during the rainy season, even when no notice to that effect has been given, if the value of dwellings has increased all over (*l. c.*, and Maimonides, *l. c.*, Law 9).

(12). In the summer the landlord may dispossess the tenant at any month upon giving him thirty days notice.

(13). He must give the tenant twelve months notice prior to the time he intends to terminate the lease, because in large cities it was difficult to obtain premises in the middle of the year.

(14). In cases of stores the landlord must give the tenant twelve months notice, because storekeepers generally sell on credit to the people of that vicinity. The landlord must, therefore, give him ample time within which to collect all his debts (Rashi to *Gemara* 101b).

(15). This view is the prevailing law, because bakers and dyers generally extend credit to their customers on long terms (*Gemara* 101b).

neighbor, he has to furnish the house with a door, a door-bolt, a lock and such other things as are required to be made by a specialist. The tenant himself has to furnish those things which do not require to be made by a specialist. The manure belongs to the lessor (16), and the lessee has a right of property only to the ashes taken out of the oven or range of pots.

Mishnah VIII. If one rents a house for one *year*, and a leap-year has been proclaimed, the entire benefit of the intercalated month goes to the tenant (17). If he rents the house by the month and a leap-year has been proclaimed, the benefit of the intercalated month goes to the landlord. It happened in Sepphoris (in Upper Galilee) that a man leased baths to his neighbor for a rent of "twelve golden *denars* a year, a *denar* per month." A leap-year having been proclaimed, the parties to the agreement brought the case before Rabban Simeon ben Gamaliel and Rabbi José (to ascertain who was entitled to the intercalated month). The latter decided that the benefit of the intercalation should be divided equally between both litigants (18).

---

(16). The manure belongs to the lessee only when it was accumulated from cattle not belonging to either party to the lease, and the place where it was accumulated had not been leased to the tenant, but not otherwise (*Gemara* 102a).

(17). In the Jewish leap-year, an extraordinary month is inserted. When the lease is made for a *year*, the intercalated month is included, and therefore the lessee is entitled to occupy the premises leased for thirteen months which constitute one leap-year.

(18). This view is not the prevailing law, because the landlord, who is the defendant in the case, is entitled to the benefit of the doubt. When, therefore, the terms of the agreement are conflicting, it is the provision which is more favorable to the lessor that prevails (*Gemara* 102b). Even when the lessor is the party plaintiff, as where the lessee has already occupied the premises during the intercalated month and the lessor seeks to recover the rent for such occupation, the burden of proof is cast upon the lessee and the lessor is benefited by the doubt. Realty is always deemed in the eyes of the law to be in the possession of the owner, and, as the doubt as to who is entitled to the benefit of the intercalated month has arisen before the premises had been occupied by the lessee, the lessor is favored with a presumption and it is then for the lessee to come forward with evidence to rebut such presumption. If the lessee is unable to produce any evidence whereby it can be proven that the baths were leased for the entire year and not by the month, he is

Mishnah IX. If one rents a house to his neighbor and it collapses, the lessor must build another dwelling for the tenant (19);

bound to pay for the intercalated month. (View of Rab Nachman, *Gemara* 102b; Alfasi; Maimonides, *Laws of Hiring*, Chapter VII, Law 2).

(19). If A says to B: "I lease you *this house* for a period of one year," and during such tenancy the house becomes untenantable, the lessor must not build another house for the lessee to be occupied by him until the expiration of the term of the lease. The reason for this is, that the sole consideration for B's promise to pay a year's rent was that A should surrender the possession of those particular premises designated in the lease. If the lessor surrenders possession thereof to the tenant, he has thereby done everything on his part he has obligated himself to do under the terms of the lease.

If A says to B: "I will lease you *a house* for one year," and thereafter when B takes possession of such house it is rendered untenantable, A is bound to build another house for B in order that he may be entitled to recover a year's rental. The consideration for the lessee's promise to pay a year's rent in this instance is the lessor's obligation to provide the lessee with a residence for the term stipulated, and not the surrender of the possession of any particular house. In this case, however, the lessor is not compelled to build a dwelling exactly similar to the one previously occupied by the tenant, but he may build any kind of a house suitable for dwelling purposes. (*Gemara* 103a;

if the first house was small, he must not build the new one larger, and *vice versa*; if the first one was a single house, he is not allowed to build two houses instead, and *vice versa*. The number of windows must not be diminished or increased, unless it is done with the consent of both parties.

Alfasi and Maimonides, *Laws of Hiring*, Chapter v, Law 7; *vide* also note 7 to Chapter VI, *supra*.)

The ruling of the present Mishnah can, therefore, be sustained only in a case where the lessor has said to the lessee: "I will lease you *a house like this one*." In such a case, the lessor is bound to provide the lessee with a dwelling similar to the one particularly mentioned, for the entire term of the lease, if such dwelling is rendered untenantable. He is, however, not compelled to build in a vicinage similar to the one wherein the previous house was built (*l. c.*).

CHAPTER IX

LETTING LAND TO FARM—WAGES—PLEDGES

Mishnah I. When one leases a field from his neighbor, he must cut (the grain) where it is the custom to cut, and pull out where it is the custom to pull out; he must plough up the ground after (cutting or pulling, in order to kill the weeds) where it is customary to plough up (1)—all depending upon the custom

---

(1). The following are the various agreements of leasing to farm, with respect to the consideration given by the lessee to the lessor for the lease, found in the Talmud: 1. Where the lessee, in consideration of the lease, agrees either to pay the lessor a certain sum of ready money, or to give him a stipulated measure of produce. 2. Where the lessee agrees to give the lessor a certain per centum of the produce of the field leased by him, thus making the consideration contingent, depending upon the fertility of the soil.

The rules of law laid down in the present Mishnah and in the one following are applicable to either one of the province. Just as they (lessor and lessee) share in the grain, in that proportion they also share in the straw and the stubble; just as they share in the wine, in that proportion they also share in the (dead) branches (of the vines) and the cane (used for the purpose of propping the vines), (for the reason) that both parties are to provide such cane.

Mishnah II. If one leases from his neighbor a field which depends upon irrigation, or which contains a group of trees, and thereafter the spring (for irrigation) ceases to run, or the group of trees is cut down, he is not entitled to deduct from the rental stipulated (by him to be paid in consideration of the lease) (2). If, however (at the time the agreement

of the agreements hereinbefore mentioned (*Gemara* 104a).

(2). A leases his field to B and, at the time such an agreement is made, neither of the parties describes the nature of the field to be leased. It thereafter turns out that the field thus leased has a spring thereon wherefrom it is artificially watered, or that it contains a group of trees. Thereafter, when B has taken possession of the field pursuant to the agreement, the spring has ceased to run or the trees have been cut down. The lessee, by reason of the aforesaid event, was made between the parties), the tenant has expressly said: "Rent me this field depending upon irrigation; this field containing a group of trees," and it thereafter happens that the spring fails or that the group of trees is cut down, he may deduct from the rental stipulated (3).

has no right to deduct from the rental agreed by him to be paid for the lease, even if the value of the field has thereby been materially depreciated. The spring or the group of trees, not having been mentioned by either party at the time of the formation of the lease, was not intended by either one of them to make it of the essence of the consideration. The law, therefore, does not make the promise of the lessee to pay the rental stipulated conditioned and dependent upon the existence of the spring or of the group of trees, if such was not the intention of the parties.

(3). If, however, at the time of the formation of the agreement of leasing, the tenant has said that *this field depending upon irrigation* or that *this field containing a group of trees* is to be leased, he may deduct from the rental stipulated, if the spring fails or the group of trees is cut off.

The reason for the aforesaid rule of law is, as stated in the *Gemara* 104a, that when the lessee says "this field" it is obvious that he has been on the premises that were to be leased and has undoubtedly carefully examined their condition and was consequently aware of the existence of the spring or of the group of trees.

Mishnah III. If one leases a field from his neighbor and he permits it to lie fallow (4), it is estimated (by the court) how much the field would have produced if cultivated, and he pays accordingly, because it is generally provided for (in leases letting land to farm): "If I allow the field to lie fallow and do not work it, I shall pay according to the best possible results" (5).

Why then was he cautious to mention specifically "depending upon irrigation" or "containing a group of trees," if not for the reason that he had intended to make the spring or the group of trees of the essence of the consideration? His promise to pay the rental stipulated was, therefore, made by him expressly conditioned and dependent upon the existence of the spring or of the group of trees. (This view is sustained by Alfasi and Maimonides, *Laws of Hiring*, Chapter VIII, Law 4).

(4). The ruling of this Mishnah refers to a case where the lessee, in consideration of the lease, agrees to pay the lessor with a certain per centum of the products of the field (Maimonides, *Commentary on the Mishnah*).

(5). It is not at all essential that an express provision to that effect should be made in the contract of leasing in order that the lessor should be entitled to the recovery mentioned in the text. In the absence of such an express provision, the lessee must pay the

Mishnah IV. If one leases a field from his neighbor and he refuses to weed it, saying to the lessor: "What does that concern you, since I will pay you all you are entitled to under the agreement," he is not to be listened to, as the lessor may say to him: "To-morrow you will surrender the possession of this field, and the weeds will then be left for me to be removed therefrom" (6).

Mishnah V. If one leases a field from his neighbor (7), and it is not productive, he must work on it as long as there is enough crop to make a heap. Said Rabbi Judah: "What standard is a 'heap of grain'? (*I. e.*, this

---

measure of damage named in the text, because it is the general custom that such a provision should be embodied in an agreement of this nature. It is, therefore, implied in law that the parties to the agreement were willing to abide by the custom of the province generally prevailing in such cases (*Tosafot* to *Gemara* 104a; Rabbenu Asher).

(6). The ruling of this Mishnah refers to a case where the lessee, in consideration of the lease, agreed to pay the lessor a certain quantity of products, not depending upon the fertility of the soil.

(7). This decision has reference to a case where the lessee is to give the lessor a certain per centum of the productions of the field (Rashi to *Gemara* 105a).

cannot be made a standard alike for large and small fields.) If, therefore, there is a probability that the products raised will be sufficient to resow the field therewith (he is not permitted to abandon it)" (8).

Mishnah VI. If one leases a field from his neighbor (9), and thereafter the crop is eaten up by a locust or is blasted (by a storm), he may deduct from the rental named in the agreement, if the calamity be general (10);

---

(8). Rabbi Judah's view does not prevail (Maimonides, *Commentary on the Mishnah*).

(9). In this case, the lessor is to receive a certain per centum from the products of the field.

(10). If it was an event which happened with most of the fields in that vicinity, the lessee may deduct from the rental stipulated (*Gemara* 105b). If, however, it was an occurrence which happened with this particular field only, the lessee has no right to deduct from the rental.

The principle of law upon which the decision in this Mishnah can be upheld cannot be elucidated either from the *Gemara* or from any of the commentators thereon. Rashi to *Gemara* 105b (obviously following the dicta found in the *Gemara* 106a) says that the reason the lessee cannot deduct from the rental in the last case cited in the Mishnah is, that the lessor may claim that the occurrence which happened was due to the ill-luck of the lessee. This, however, but if it is not a general calamity, he has no right to deduct from the rental. Rabbi Judah says: "If the lessee has leased the field for a money consideration, he cannot deduct from the rental under any circumstances" (11).

Mishnah VII. When one leases a field from his neighbor for ten *kors* of wheat per annum, and the quality of the wheat raised is poor, he may pay the lessor with part of the same; should the wheat raised happen to be better than usual, he cannot say to the lessor: "I will buy wheat (of ordinary quality) in the market and pay you therewith," but he must pay his rent out of his own crop (12).

cannot be claimed by the lessor when it was a general calamity.

(11). This view does not prevail; it is of no moment whether the lessee's promise was to pay a money consideration or to pay with the products of the field (Maimonides, *Commentary on the Mishnah*).

(12). A leases his field to B for the purpose of sowing a certain crop, say wheat, and, in consideration of such lease, the latter agrees to pay to the former a certain measure of wheat. It is, however, not stated expressly whether it should be paid with a measure of wheat yielded from the field, or with wheat bought in the market. Such an agreement is then construed

Mishnah VIII. He who rents a field from his neighbor for the purpose of sowing barley, has no right to sow wheat; if for the purpose of sowing wheat, he may sow barley; Rabban Simeon ben Gamaliel forbids it (even in the last named instance); if to sow grain, he has no right to sow pulse; but if for pulse, he may sow grain instead; Rabban Simeon ben Gamaliel forbids it (even in the last named instance) (13).

Mishnah IX. If one leases a field from his neighbor for a *few* years (less than seven), he is not permitted to sow flax (14); neither is he allowed to cut timber from the sycamore-

---

by the court to import that it must be paid with the wheat produced from the field irrespective of its quality.

(13). The law in such cases is, that the lessee must not vary the provision embodied in the agreement only when the products he intends to sow will harm the soil to any greater extent than those he has originally agreed to sow, but he is permitted to vary it *vice versa.*

(14). The lessee, at the expiration of the term of the lease, is bound to surrender the field in as good a condition as it had been when he first took possession thereof. He, therefore, must do no act which tends to cause such injuries to the field as would be irrepatrees (15). If, however, he has leased it for seven years, he may sow flax and cut timber from the sycamore-trees (in the first year only).

Mishnah X. When one leases a field for a *Sabbatical season* for the sum of seven hundred *zuz*, the Sabbatical year is included in the term of the lease. If, however, he leases it for *seven years* at a rent of seven hundred *zuz*,

---

rable before the time he has to surrender the possession of the field to the lessor.

As explained by Rashi to *Gemara* 109a, the soil is injured by the roots of the flax to such an extent that it cannot be brought back to its original state before the expiration of seven years. If, therefore, the lease is for a lesser term than seven years, no flax may be sown by the lessee, because the injury caused to the soil by its roots will remain even after the termination of the lease.

(15). The lessee is likewise prohibited from cutting timber, because the trees wherefrom the timber is cut are generally not restored to their previous state of growth before the expiration of seven years. If the lease is for less than seven years and the lessee cuts timber in the meantime, he will thereby become disabled from surrendering the field, at the termination of the lease, in the condition it has been when he first took possession thereof.

the Sabbatical year is not included in the term of the lease (16).

Mishnah XI. A laborer hired by the day collects his wages at any time during the night (following the day of his employment) (17); one hired by the night, at any time during the (following) day; one employed by the hour, at any time during the night and the (following) day (18); one employed by the week, month, year or Sabbatical season, if his term expires in the day, he collects his wages during the remainder of the day; and if his term expires during the night, he collects during that night and on the (following) day.

---

(16). A and B enter into an agreement whereby it is stipulated by them that A shall lease his field to B for a *Sabbatical season*, and the latter, in consideration of the lease, promises to pay the sum of seven hundred *zuz* to the former. The Sabbatical year, on which the soil is to rest (Lev. XXV, 1–7), is then to be included in the term of the lease, because by the term *Sabbatical season* is generally understood to mean, six years of sowing the soil and one year of resting it, but not seven *years* of sowing. When, however, the agreement sets forth that the field shall be leased to B for *seven years*, the Sabbatical year is not to be included in the term of the lease, because the term *seven years* imports, seven years within which the lessee shall be able to sow the field leased.

(17). The time within which an employee can collect his wages is fixed in the present Mishnah, in order to ascertain whether or not the employer is guilty of violating the commandment of the Pentateuch (Lev. XIX, 13): " There shall not abide with thee the wages of him that was hired through the night until morning."

Mishnah XII. The commandments of the Pentateuch: "On the same day shalt thou give him his wages" (Deut. XXIV, 15), and "There shall not abide with thee the wages of him that was hired through the night until morning" (Lev. XIX, 13), apply to the payment for the use of cattle or implements as well as to wages. (The employer, however, is considered a violator of the above commandments only) when the employee demands his wages from him (in due time); but if no such demand is made, the employer is not considered a violator. If the employer has given the employee an order to a storekeeper (to get from him merchandise to the amount of his wages), or to a money-changer (to get the amount due from him), the former is not guilty of violating the above commandments (if the laborer is not paid by the third parties within the time above specified) (19).

---

(18). As explained by Rab (*Gemara* 111a), if a laborer is employed to work for a few hours in the daytime, he has time to collect his wages during the remainder of that day; when he is engaged to work for a few hours in the nighttime, he can collect during the remainder of that night. This explanation of the text is upheld by Alfasi and Maimonides, *Laws of Hiring*, Chapter XI, Law 2).

A laborer can collect his wages merely with an oath (and need not produce any other evidence), if the time (provided for by law to collect the same) has not yet expired; but if the time for collection has already expired, he cannot collect his wages with a mere oath (20). If, however, there are witnesses to testify that the employee has made a demand upon his employer (in due time and that he was not paid then), he can collect his wages with an oath (even when the time for collecting the same has already expired).

---

(19). If the employer, in due time, gives the laborer an order to a third party, and the laborer consents thereto, it is considered in the eyes of the law as satisfaction and payment of the debt. The employer is, therefore, not considered guilty of violating the commandments, if the third party fails to pay in due time.

(20). According to the Mosaic Law, an oath is administered to a defendant only, and the effect of the oath is to exempt him from liability, because he is always favored with the presumption of possession. (*Vide* note 1 to Chapter I, *supra.*) In certain cases,

The precept (Deut. XXIV, 15): "On the

however, the Rabbis have modified the said rule of law, and have enacted that the plaintiff should take an oath instead and thereby succeed in making out the burden of proof cast upon him. (*Vide Shebuoth*, Chapter VII, Mishnah I.)

In the case as presented in the text, the employer would, according to the Law of Moses, have to take an oath that he paid and be exempt from liability, because he is the defendant in the case. But as he is much occupied with his business and is consequently more apt of mistaking facts than the employee, it was enacted that the latter should take an oath instead, and thereby prove his case (*Gemara* 112b; Maimonides, *Laws of Hiring*, Chapter XI, Law 6).

The laborer, however, can collect his wages with an oath only when the action was instituted by him in due time, for then his claim is supported by the presumption, that a debt is generally not paid before it is due. But when he institutes an action after due time, he must come forward with evidence to prove his case, because then there is the presumption raised, in favor of the employer, that every man is honest and would not knowingly violate a holy command (*Gemara* 112b–113a).

same day shalt thou give him his wages," applies also to a proselyte (laborer), but the commandment (Lev. xix, 13): " There shall not abide with thee the wages of him that is hired through the night until morning," does not apply.

Mishnah XIII. He who lends money to his neighbor may take a pledge from him only by an order from the court (21); and he is not allowed to enter the debtor's house to take the pledge (22), as it is said (Deut. xxiv, 11):

---

(21). A lends money to B to be paid at a certain fixed time, say thirty days. If the debtor does not pay the sum due within the time specified, the creditor has then a right to take a pledge from him in order to secure the payment of the debt. He, however, cannot take such pledge without obtaining an order from the court to that effect, and the order must be carried out by an officer from the court only (*Gemara* 114b; Rashi to *Gemara* 113a).

At the time the loan is effected, however, the creditor may take a pledge to secure the payment thereof without having to obtain an order from court to that effect (Gemara *l. c.;* Maimonides, *Laws of Creditor and Debtor*, Chapter III, Law 5).

(22). Even the court officer is not permitted to enter the debtor's house to take the pledge (*Gemara* and Maimonides, *l. c.*).

"In the street shalt thou stand (and the man to whom thou dost lend shall bring out unto thee the pledge into the street)." If two vessels were pledged, the pledgee may detain one, but must restore the other (whenever necessary); *e. g.*, (if the pledgor has given a pillow and a plough in pledge), the pledgee must return the pillow for the night and the plough for the day (23). If the pledgor dies, the pledgee is not obligated to make such returns of the pledge to the heirs (24). Rabban Simeon ben Gamaliel says: "Even to the pledgor himself the pledgee is bound to return the pledge for the first thirty days only; thereafter he may sell it under the supervision of the court" (25).

---

(23). The pledgee must return the vessel pledged whenever it is needed by the pledgor to make use thereof. This tanna is of the opinion that a vessel wherewith life-giving food is made may never be sold by him for the purpose of satisfying the debt, and daily returns thereof must be made to the pledgor. The benefits the pledgee derives from such a pledge are thus enumerated in the *Gemara* 115b: 1. That the pledge saves the debt from being barred by the law of limitations for collecting debts, which is until the Sabbatical year; 2. That the pledgee acquires a lien on the pledged article, and if the pledgor dies without leaving real property, he may sell such article to satisfy the debt. Otherwise, when one dies possessed of personal property only, the creditors cannot collect their debts from the personalty in the hands of the heirs.

(24). The creditor may sell the articles pledged

No pledge may be taken from a widow whether she is rich or poor, as it is said (Deut. XXIV, 17): "Thou shalt not take in pledge the raiment of a widow."

He who takes a mill in pledge violates a negative commandment and is guilty of taking two implements to pledge (26), as it is said (*l. c.* 6): "No man shall take to pledge the

to satisfy the debt upon the death of the debtor. The right given to the pledgor, that an article wherewith life-giving food is made may never be sold by the pledgee, is purely personal and is not inheritable.

(25). Rabban Simeon's view is not sustained by weight of authority. The prevailing opinion is in accord with the anonymous decision of this Mishnah, that implements used for the preparation of life-giving food may never be sold by the pledgee during the lifetime of the pledgor, and daily returns thereof must be made until the debt has been satisfied.

(26). If he takes to pledge both millstones, even at one and the same time, he is guilty of violating two negative commandments and is punished accordingly. (*Vide Makoth.*)

nether *or* the upper millstone." The aforesaid rule of law applies not only to millstones but to any implements wherewith life-giving food is made, as it is said (*l. c.*): "For he taketh a man's life to pledge."

CHAPTER X

RIGHTS OF UPPER AND LOWER OWNERS—RIGHTS OF UPPER TENANT—USE OF PUBLIC THOROUGHFARES

Mishnah I. If a house and the upper story, belonging to two persons, collapse (1), both owners share in the timber, stones and mortar (2). (If some bricks are broken), an investigation is to be made to ascertain from what part of the building they were most likely to get destroyed. If one of the owners recognizes some of the stones (to be his), he may take them, provided they are counted in (his share) (3).

---

(1). The house is owned by two persons, the lower compartment belonging to one and the upper story to the other.

(2). Both owners share in the materials only when there is no circumstantial evidence whereby it can be ascertained to what part of the building the broken material belonged, but not otherwise (*Gemara* 116b).

(3). The one who recognizes the material is en-

Mishnah II. If there is a lower story (occupied by the owner) and an upper story (inhabited by a tenant), and (the ceiling of the lower story, serving as flooring to upper story) is out of repair, the owner refusing to repair the same, the occupant of the upper story has a right to reside in the lower compartment until the ceiling is repaired by the owner (4).

---

titled to it only when the adverse owner admits that part of such material belongs to him, and as to the residue he does not know whether it belongs to his co-owner or not. Such part admission, made by the adverse co-owner, casts upon him the burden of taking an oath to the effect that the remaining part of the material in dispute does not belong to the claimant. He is, however, disabled from taking an oath in this instance because he admits that he does not know to whom the remainder belongs. The one, therefore, who has recognized the material is entitled to the whole of it (*Gemara* 116b; *vide* also note 2 to Chapter VIII, *supra*).

(4). The *Gemara* 116b says that this rule of law holds true only in a case where the lessor, at the time the lease was made, said to the lessee: "I lease you this upper story *on this house.*" The lessor, in specifying "on this house," has thereby granted an easement to the tenant, making the lower compartment servient to the upper story, and has obligated himself to keep the lower story in good repair so that it should not interfere with the tenant's enjoyment of possession.

Rabbi José says: "The dweller below must provide the ceiling, and the one above the pavement (covering the ceiling of the lower story and serving as flooring to the upper story)" (5).

Mishnah III. If a house and the upper

(*Vide* note 7 to Chapter VI, and note 19 to Chapter VII, *supra*).

The following principle of law would seem to follow from the rules of law laid down in the present Mishnah and in Mishnah IV, *infra*: If a man acquires an easement either by grant (as in the present case) or by necessity (as in Mishnah IV, *infra*), he may, as a matter of law, make of the servient tenement that very use he was entitled to make of the dominant tenement, if the owner of the servient tenement allows it to run out of repairs, thus preventing the owner of the dominant tenement from properly enjoying in its possession.

(5). Rabbi José is of the opinion that the pavement covering the ceiling of the lower story is made for the convenience of the upper tenant, to make the floor level, but not for his safety, and therefore the lessor is not bound to repair it. The anonymous tanna is of the opinion that the pavement is made chiefly for the purpose of preserving the floor, and, as it is for the safety of the upper tenant, it is incumbent upon the owner to repair it (*Gemara* 117a). The view of the anonymous tanna is the prevailing law (Maimonides, *Laws of Hiring*, Chapter VI, Law 4).

story thereon, belonging (severally) to two persons, collapse, and the upper owner requests his co-owner to rebuild (his lower story) but he refuses to do so, the former may rebuild the house (lower compartment) and occupy it until his co-owner will reimburse him all the expenditures (he has incurred in rebuilding it). Rabbi Judah says: "Even in such a case the upper owner is occupying his co-owner's premises, and therefore must pay him rent for such occupation. If, however, the upper owner rebuilds both stories and roofs the upper one, he may then occupy the lower story gratis until he is reimbursed by the lower owner" (6).

(6). The view of the anonymous tanna is, that when one derives certain benefits from the property belonging to another, he is not bound to pay for such benefits if the use of the property is not in any way detrimental to the owner. In other words, one is bound in law to pay not for the *benefits* he obtains for himself from the property belonging to another, but for the *detriments* caused to the one out of whose property such benefits were derived.

In the present case, the lower owner has not consented to rebuild his story, and consequently had no intention of making use of his vacant lot. If, there-

Mishnah IV. The same is the case with an olive-press which is built in the crevice of a rock, and on the top of which there is a garden (belonging severally to two persons). If the roof of the press collapses (so that the upper owner is unable to sow in his garden), the owner of the garden has a right to descend to the bottom of the press and sow there, until

fore, the upper owner rebuilds the lower compartment and occupies it, the lower owner is not to be compensated for such occupation because it is not in any way detrimental to him.

Rabbi Judah's view, on the other hand, is that one is bound to pay for the benefits he obtains from the property belonging to another, even when such use does not prove to be detrimental to the owner thereof. The only instance in which one is not obligated to pay for the use of a certain article belonging to another, is where such use is neither beneficial to the one using it, nor is it detrimental to the owner.

In the case mentioned in this Mishnah, the upper owner is not bound to pay for the use and occupation of the lower compartment only in the event when he rebuilds and completes both stories. The upper owner is not then benefited in any way by such use as he has his own story ready for occupation, and the lower owner does not sustain any loss thereby as he did not intend to have his story rebuilt at present. (The latter opinion does not prevail; Maimonides, *Commentary on the Mishnah.*)

vaults will be built by the owner thereof (to support the roof of the press-house) (7).

If a wall or a tree falls on a public thoroughfare and causes some damage, the owner is not liable (8). If, however, time was given to him (by court) within which to cut off the tree or to tear down the wall (9), (the law then is that) if it falls before the time has expired, he is not liable; but if it falls thereafter, he is liable.

Mishnah V. One has his wall situated near the garden of his neighbor and it falls (into such garden). The neighbor says to him (the owner of the wall): "Remove your stones (from my garden)." The owner in reply says: "They shall be yours (as I renounce my right of ownership to them)," he is not to be listened to (10). If, however, after the neighbor has accepted such offer, the owner says: "Here are the expenditures (incurred by you in removing my stones from your field), and I will take what belongs to me," he is not to be listened to (11).

---

(7). In this case, the owner of the garden acquires an easement, to make use of the support of the vaults of the press-house, by necessity; for otherwise he is unable to enjoy the possession of his garden. As to the principle of law involved in this Mishnah, *vide* note 4, *supra*.

(8). The owner is not liable in this case because it is considered an unavoidable accident (Rashi to *Gemara* 117b). It must, however, be proven by him that the wall was properly built, otherwise he is liable (*Tosefta* B. M. XI, 5), because the mere fact that a wall collapses raises a *prima facie* presumption that it was not properly built.

(9). The time given by the court for tearing down a wall or for cutting off a tree was thirty days (*Gemara* 118a).

One engages a workman to perform certain labor on straw or stubble. (When the work is completed), the laborer says to the employer: "Pay me my wages," and the employer says: "Take the material on which you performed your labor in lieu of your wages," the latter is not to be listened to. If, however, after the laborer has accepted such offer, the employer says: "Take your wages, and I will take back what belongs to me," he is not to be listened to.

---

(10). The owner of a collapsed wall is bound to remove the stones, and he cannot, by renouncing his right of ownership, free himself from such an obligation.

(11). The owner cannot retract then because there was a valid agreement entered into between the parties to the effect that the owner of the garden, in consideration of having been vested with title to the stones, has obligated himself to remove them from his field at his own expense.

If one places his manure on public grounds, it must be removed, by those who desire to make use of it, immediately after it has been placed there. Clay must not be soaked and bricks must not be made in a public thoroughfare; clay may, however, be kneaded in a public thoroughfare when needed for building purposes, but not for the purpose of making bricks therefrom. If one builds at a public thoroughfare, the materials must be used as soon as they are placed there (so that they shall not be left there for any unnecessary length of time), and even then if some damage is caused, he is liable. Rabban Simeon ben Gamaliel says: "Building materials may be prepared in a public thoroughfare for a period of thirty days" (12).

---

(12). This view is not the prevailing law (Maimonides, *Commentary on the Mishnah*).

Mishnah VI. Two gardens are situated one above the other and some herbs grow between them (13). Rabbi Meïr says: "They belong to the upper owner," and Rabbi Judah says: "They belong to the lower owner." Said Rabbi Meïr: "If the upper owner would desire to remove the earth (to make it level with the adjacent land), there would be no herbs." Replied Rabbi Judah: "If the lower owner would desire to fill up his garden with earth, there would be no herbs." Rejoined Rabbi Meïr: "Since either one is able to prevent the growing of such herbs, it must be investigated from what sources the herbs derive their existence." Rabbi Simeon says: " The upper owner may take whatever he is able to reach with his hand, and the remainder belongs to the lower owner" (14).

(13). The herbs grow on the steep precipice of the higher field, overhanging the field of the lower owner.

(14). His view is the prevailing law (Maimonides, *Laws of Adjacent Owners*, Chapter IV, Law 9).

APPENDIX

ABAYI. Lived in Babylonia; born about the close of the third century C.E.; died in 339.

ABBA SAUL. Lived about the middle of the second century C.E.

AKIBA (ben Joseph). Lived in Palestine; born about 50 C.E.; martyred at about 132.

ALFASI (Isaac ben Jacob). Born in 1030 C.E., at Kala't ibn Hamad, a village near Fez, in Northern Africa; died at Lucena in 1103.

ASHER (ben Jechiel). Born in Western Germany about 1250 C.E.; died in Toledo, Spain, in 1328.

BABA BATHRA. Name of a Talmudic treatise of the Order Nezikin.

BABA KAMA. Name of a treatise of the Order Nezikin.

BERTINORO (Obadiah ben Abraham). Lived in the second half of the fifteenth century C.E., in Italy; died in Jerusalem about 1500.

CAB. A measure of capacity; one-sixth of a *seah*.

DEMAI. Name of a Talmudic treatise of the Order Zeraïm.

DENAR. A silver coin; one-twenty-fourth of a gold *denar*.

ELEAZAR (ben Hisma). Lived in the second century C.E.

ELIEZER (ben Hyrcanus). Lived in the first and second centuries C.E.

GAMALIEL II. Lived at the end of the first and at the beginning of the second centuries C.E.

GEMARA. A part of the Talmud containing discussions and decisions, which were put to writing after the reduction to writing of the Mishnah.

GITTIN. Name of a Talmudic treatise of the Order Nashim.

HILLEL (the Elder). Doctor of the Law at Jerusalem; born about 110 B.C.E.; died about 10 C.E.

HUNAH. Lived in Babylonia; born about 216 C.E.; died about 296.

ISAR. A coin; one-twenty-fourth of a *denar*.

JADDUA (the Babylonian). Lived in the second century C.E.

JOHANAN (ben Nuri). Lived in the first and second centuries C.E.

JOHANAN (ha-Nappa). Born in Sepphoris, Upper Galilee, in the last quarter of the second century C.E.; died at Tiberias, in 279.

JOSÉ (ben Halafta). Born in Palestine; lived in the second century C.E.

JOSÉ (ben Judah). Lived at the end of the second century C.E.

JOSÉ (the Galilean). Lived in the first and second centuries C.E.

JUDAH (ben Ilai). Lived in the second century C.E.; born at Usha, a city in Galilee.

JUDAH (ha-Nasi I). Patriarch; redactor of the Mishnah; born about 135 C.E.; died about 220.

KETUBOTH. Name of a Talmudic treatise of the Order Nashim.

Kidushin. Name of a treatise of the Order Nashim.

Kor. A measure of capacity; seventy-four *lugim*.

Lug. A liquid measure.

Maimonides (Moses ben Maimon). Born at Cordova, Spain, March 30, 1135 C.E.; died at Cairo, Egypt, December 13, 1204.

Meïr. Lived in the second century, C.E.; born in Asia Minor.

Mordecai (ben Hillel ben Hillel). Born in Germany at the beginning of the thirteenth century C.E.; died as a martyr at Nuremberg, August 1, 1298.

Nachman (ben Jacob). Lived in Babylonia; born in the third century C.E.; died in 320.

Papa. Lived in Babylonia; born about 300 C.E.; died in 375.

Perutha. A small coin; one-eighth of an *isar*.

Pundiun (Dupondium). A Roman coin equal to two *isars*.

Rab (Abba Arika). Lived in Babylonia; flourished in the third century C.E.; died at Sura in 247.

Rabba. Born about 280 C.E., at Mechoza, Babylonia; died there in 352.

Rashi (Solomon ben Isaac). Born at Troyes, France, in 1040 C.E.; died there July 13, 1105.

Sanhedrin. Name of a Talmudic treatise of the Order Nezikin.

Seah. A measure of volume for dry objects and for liquids; equal to twenty-four *lugim*.

Sela. A coin equal to one sacred or two common Shekels.

Shammai. Scholar of the first century B.C.E.

Shebuoth. A name of a Talmudic treatise of the Order Nezikin.

Simeon (ben Eleazar). Lived in the second century C.E.

Simeon (ben Gamaliel II). Lived in the first and second centuries C.E.

Simeon (ben Yochai). Lived in the second century C.E.

Symmachus. Lived in the second century C.E.

Tarfon. Lived in the first and second centuries C.E.

Tosafot. Critical and explanatory glosses on the Talmud by French and German scholars of the twelfth and thirteenth centuries C.E.

Tosefta. An extant collection of Mishnah under the redaction of Rabbi Hiyya and Rabbi Oshaya.

Yebamoth. Name of a Talmudic treatise of the Order Nashim.

Zerachia (ben Isaac ha-Levi Gerondi). Lived in the twelfth century C.E., in Spain.

Zuz. A silver coin; one-fourth of a Shekel.

INDEX

A

Abandonment, theory of, 28; public place, applies only to articles found in, 36 n.
Adjacent Lands, herbs growing on precipice of, 193
Admission (*see* Part Admission), must be against interest, 18 n.
Agency, how created, 14 n.
Agents, exceeding scope of authority, 123 n.
Alimony, grant of, 24
Animal, when to be considered lost, 43–44, 46; unloading, duty to help in, 46–48; reloading, duty to help in, 47 n.
Animals *Feræ Naturæ*, title to, 4, 15–16 n.
Arbiters, documents referring to selection of, 25
Artisans, are bailees for hire, 131
Assessment, document relating to, 21

B

Bailee, trust of, in general, 3 right of, to sue third party, 5, 52 n.; possession of, is that of bailor, 5, 51 n., 52 n.; document of indebtedness deposited with, 26–27; penalty paid by thief, when entitled to, 50–51; oath of exoneration, effect of, 52 n.; right to take, cannot be delegated, 53–54 n.; witnesses, when able to procure, 145 n.; delegation of trust by, 52–55; to a sub-bailee of greater liability, 56 n.; wife or child, delegated to, 67 n.; uncertain who deposited bailment, 56; fruit stored with, not to sell, 60; deduction by, for lees, etc., 60–62; making temporary use of bailment, 63–66; money deposited with, 66–69; conversion by, 69–72; gratuitous, 142, 143 n.; exempt from taking oath, when, 91–92; for hire, 142, 144 n.; exempt from payment, when, 92; stumbling not liable in cases of, 133–134; reason for rule, 134–135 n.; *prima facie* case, when to rebut, 144 n.
Bailment, bailor and bailee have qualified property in, 2; contract of, defined, 5; two bailors laying claim to, 57–59; gratuitous, acceptance of offer for, 131; the four bailments, 142–145
Bailor, right of, to sue third party, 5, 52 n.; penalty paid by thief, when entitled to, 51–52
Bargain and Sale. (*See* Sales.)

Barter, defined, 73; consummation of, 77, 78 n.
Borrower, liability of, 142, 145 n.; exempt from, when, 145 n., 151; when commences, 158; upon return of bailment, 158 n.; agent appointed by, 157 n.
Burden of Proof. (*See* Plaintiff).

C

Caveat Emptor, rule of, 17 n., 80 n.
Chattels Real, defined, 6
Chose in Action, definition of, 2–3
Claim, amount of. (*See* Part Admission.)
Coins (*see* Sales, coins), belonging to finder, when, 30; in a loaf of bread, 31; to be proclaimed, when 32, 37 n.; found by buyer in fruit, 36–37
Collusion and Payment. (*See* Presumption.)
Commodatum, defined, 145 n.
Compulsion. (*See* Overpowering Force.)
Conditions (*see* Sales, conditions), precedent and subsequent, 147–150 n.; impossible, 150 n.; void, effect upon contract, 150 n.
Conduct, agency created by. (*See* Agency.)
Consideration, non-payment of, in sales, 74, 78–79; for promise of marriage, 87 n.; becomes a debt, when, 103 n., 126 n.; must be new obligation, 124 n.
Contract, breach of, 105 n., 125–126 n.; altering terms of, 125 n.; contrary to law, 147 n.; definition of, 148 n.
Conversion (*see* Bailee, conversion), notice of restoration, 65 n.; measure of damages, 69–70 n.; converter to return article converted, 70 n.
Corporeal, definition of, 3
Court, of common men, 45 n.
Creditor (*see* Usurious Contracts; Usury), may follow debtor's realty, when, 17 n.; forfeiture of debtor's estate to, 105

D

Damages. (*See* Conversion; Lessor and Lessee.)
Deception, vendor leaving room open for, 96–97 n.
Defendant (*see* Part Admission), need only balance evidence, 8 n.; entitled to benefit of doubt, 159 n.
Demai, defined, 88 n.
Depositum. (*See* Bailee, gratuitous, for hire.)
Divorce, bill of, 20
Document, execution of, has effect of recording encumbrance, 17 n.; presumed to be of no validity when lost, 24 n.; properly executed, duty of one finding, 25
Document of Indebtedness (*see* Lien), duty of one finding, 17–19; surrendered upon identification, when, 25–26; presumed to be paid when lost, 19 n.; sale of, 90–91
Dominant Tenement, defined, 6

E

Easement (*see* Servient Tenement), definition of, 6; by necessity, 190 n.
Elijah Will Come, defined, 27 n.
Embellishment. (*See* Sales.)

Employment (*see* Wages), contract of, defined, 5; breach of, 122–125; after part performance, 123–124 n.; effect of local custom upon, 136–137; employee partaking of fruit he handles, 137–142
Equity, in Jewish jurisprudence, 84–85 n.
Evidence, 152–157, 158–161
Exchange. (*See* Barter.)

F

Father, disobeyed, when to be, 46; precedence over teacher, when, 49
Fifth, added to principal, when, 88–89
Finder (*see* Lost Articles), possession *a priori*, must obtain, 11 n.; must be of entire article, 13 n.; animal, right to dispose of, 40–41; right to make use of proceeds, 41–42 n.; ready money not to make use of, 42 n.; use of books and vessels, 42–43; exempt from taking charge, when, 43; duty of, to return article many times, 44; compensation of, 45
First Ripe Fruit, 89 n.
Fourth Year, plantation of, 89 n.

G

Gift (deed of), duty of one finding, 20; delivery, of no validity without, 20 n.; donee to prove, when, 22 n.; irrevocable, 20–21 n.; death of donor, to take effect after, 22–23 n.

H

Halizah, deed of, 24
Heave-offering, not a Priest partaking of, 88; of the first tithe, defined, 88 n.
Hirer, varying terms of agreement, 126–130; not liable in every case, 129 n., 130 n., lien of, 128 n.; liability of, 142, 144 n.
Hiring (see *Locatio Rej*), contract of, construed, 127 n.
Honesty, presumption of. (*See* Presumption.)

I

Identification (*see* Lost Articles), number, 26 n.; probable accidental marks of, 31 n.; general impression of form, 32 n.; amount, 38 n.; place, 38 n.; stating the article lost, 40; deceiver describing marks of, 40
Incorporeal, defined, 4
Infinitive, use of, with finite form of verb, 44 n.
Iron Sheep, definition of, 110 n.
Issue, joinder of, 25 n.

L

Landlord and Tenant, dispossessing tenant, 162–163; notice by Landlord, 162 n.; notice by tenant, 162 n.; rent, landlord may raise, when, 163 n.; increase of (*see* Usurious Contracts), what the respective parties must furnish, 163–164; manure, who is entitled to, 164; intercalated month, to whom goes benefit of, 164–165; premises becoming untenantable, 166–167; upper tenant, rights of, 186; landlord to repair pavement, 187
Leap Year, defined, 164 n.

Lease, conflicting terms in, 165 n.; well or group of trees of essence of, when, 169; Sabbatical year included in term of, when, 176

Lessor and Lessee, loan of wheat to tenants on shares, 116; agreements letting land to farm, 168 n.; lessee offering higher rent for making loan, 109–110; forfeiting rights under lease, 116–117 n.; allowing field to lie fallow, 171; duty of, to weed, 172; when allowed to abandon field, 172; right of, to deduct from rental, 173; products of soil, to pay lessor with, 174 n.; sowing crop other than stipulated, 175; sowing flax or cutting timber, 175; to surrender premises in good condition, 175 n.

Lien (*see* Hirer; Pledges), in documents of indebtedness, 17 n.; implied, 19 n.; of artisan, 131 n.

Loan, definition of. (*See* Commodatum.)

Locatio Rei, defined, 144 n.

Lost Articles (*See* Finder; Identification; Proclamation), title to, 4; oath, administered to persons laying claim to, 7–11; must have actual possession, 8 n.; imposition of, is rabbinical, 9 n.; reason for form of, 10 n.; admission and procurement of witnesses, 12; *res adjudicata*, subsequent to, 12 n. appointment of agent, 13; picked up by one on behalf of another, 12–13 n.; child, wife or servant, found by, 16; belonging to finder, 30; reason for rule (*see* Abandonment), when articles are new, 32; to be proclaimed, 32; value of articles, 87; behind fence, in dung-heap or wall, 33; in premises occupied by successive tenants, 34 n.; non-Israelites, not surrendered to, 34 n.; in a city the majority of whose inhabitants are, 35 n.; store found in, 35; Persian Law, according to, 35 n.; Hammurabi, law of, according to, 36 n.; money-changer's stand, found in front of, 36; private place, found in, 36–37 n.; when loser was heard to despair of regaining, 38–39 n.; precedence in returning, 49

M

Manumission, deed of, 20

Marriage, of minor female, 25 n.; contract of, what constitutes, 87 n.

Minority, definition of, 24 n.

Money-changer, money deposited with, 67

N

Negligence, degrees of, 142–143 n.; party guilty of, to suffer inevitable loss, 57 n.

Non-Israelites. (*See* Lost Articles; Usury.)

Notice. (*See* Conversion; Landlord and Tenant; Wall.)

Nudum Pactum, when transaction is, 79 n.

O

Oath (*see* Bailee; Lost Articles), when administered, 7 n.; effect of, 7 n.; defendant, administered to, 8 n.; hearsay, not administered

Oath—*Continued*
upon, 54 n.; of adherence, 156 n.; plaintiff, when administered to, 179–180 n.
Occupancy, title by, 4
Overpowering Force, definition of, 143 n.; what constitutes, 143–146
Overreaching, what constitutes 79, 86; law of, applies to vendor, 81; has unlimited time, 81 n.; to a merchant, 81; to personalty having a *pretium faciendi*, 93 n.; does not apply, deceived party having knowledge, 82 n.; to realty, slaves, etc., 90; vendee not acquiring immediate possession, 91 n.; remedies of overreached party, 82 n.; in cases of coins, 83; by means of words, 93.

P

Part Admission, defendant making, effect of, 86, 185–186 n.; when incapable to take an oath, 153 n., 186 n.; claim, must be part of, 155 n.; amount of, in such cases, 86
Penalty. (*See* Promise; Insincere; Thief.)
Perjury, one suspected of extortion not suspected of, 9–10 n.
Personal Property, definition of, 1; exempt from execution after death of debtor, 182 n.
Perutha, when sufficient, 87
Pignus, definition of, 5
Plaintiff (*see* Oath, plaintiff), cannot prove claim with oath, 9 n.; has burden of proof, 9 n., 56 n., 157 n.
Pledge. (*See* Pignus), taken by order from court, 181 n.; pledgee, acquires lien, 182 n.; liability of, 132; letting out pledge, 133; violating two commandments, when, 183–184; saves debt from being barred by limitations, 182 n.; to be returned daily to pledgor, when, 182, 183 n., cannot be taken from a widow, 183
Possession, is presumptive evidence of ownership, 8 n.; by finder, what constitutes, 11 n.; leading animal, 12 n.; riding on animal, 12 n.; falling does not constitute, 15; field, is considered as, 15
Postscript, attached to documents, 27
Potential Existence, 115 n.
Presumption (*see* Possession), of honesty, 7–8 n.; 77, 180 n.; of knowledge, on part of purchasers, 17 n.; of collusion and payment, 18 n., 19 n.; of preëmption, 159–160 n.
Priest, seeing lost animal on cemetery, 46; his share of the dough, 88
Principal and Agent. (*See* Agency; Agents.)
Proclamation, test of, 38; manner of, 39
Promise (*see* Consideration), for promise, 76; insincere, when considered as, 106 n.
Property, in possession, 1–2; in action, 2; absolute, 2; qualified, 2
Proselyte, defined, 111 n.
Protest, letter of, 24
Public Thoroughfare, use of, 192.

Q

Quantum Meruit, employees entitled to, when, 123 n.
Quasi Contract, between bailor

Quasi Contract—*Continued*
and sub-bailee, 56 n.; between employer and employees, 123 n.

R

Realty, cannot be stolen, 91–92 n.; always deemed to be in possession of owner, 165 n.
Reciprocity, doctrine of, 34–35 n., 111 n.
Recording, encumbrance on realty, 19 n.
Release, from debt, duty of one finding, 20
Reloading, duty to help in. (*See* Animal.)
Rent (*see* Landlord and Tenant), when due, 103 n
Res Adjudicata. (*See* Lost Articles.)

S

Sabbatical Season, defined, 177 n.
Sages, definition of, 19 n.
Sale and Exchange, defined, 5
Sales (*see* Overreaching; Usurious Contracts), lees, loss of, who is to suffer, 62–63 n.; law of, what includes, 73; consummation of, according to Law of Moses, 73; as modified in the Talmud, 74–75; subject-matter, who suffers loss of, 73, 75; coins, sale of, 77–78; condition implied in law, 80 n.; seller, giving vendee fruits from various fields, 94; merchant permitted, 95–96; liable as a gratuitous bailee, 74, 75; mixing strong wine with mild, 94–95; mixing lees of one wine-jug with another, 95; not to embellish articles, 97; present, subject-matter not being in existence, 113 n.; subject-matter being in state of embryo, 114 n.
Sanctuary, property belonging to, mal-appropriation of, 87 n.; redemption of, 89; law of overreaching affecting sale of, 90–91
Servient Tenement, definition of, 6; tenant may make use of, when, 187 n.
Slaves, classed as realty, 90 n.
Speak, duty to, 14 n.
Statement (unsworn), effect of, 7 n.
Store, considered a public place, 36 n.
Storekeeper, money deposited with, 69; distributing gifts to children, 96; market price, selling below, 96; sifting pounded-beans, 96–97
Stumbling, is ordinary negligence, 134, 135 n.

T

Teacher, has precedence over father, 49
Theft, law of, not applicable to realty, etc., 91
Theft and Loss, defined, 143 n.
Thief (*see* Theft), damages, double, 51; fourfold, 51 n.; fivefold, 51 n.; uncertain who the robbed party is, 56; restoration, notice of, 65 n.; personal return, when to make, 88 n.; one-fifth, when to add, 89
Title, how acquired in general, 4; to a thing not possessed by vendor, 102 n.
Transgression, defined, 143 n.
Trees (*see* Lease), producing fruit when sold for fuel, 161 n.; deposited in the field of another, 162; falling into public thoroughfare, 190

U

Unloading, duty to help in. (*See* Animal.)

Upperand Lower Owners, their respective rights, 185; lower owner refusing to rebuild his story, 187–188

Use, made of property belonging to another, 188–189 n.

Usurious Contracts, debt paid with merchandise, 100 n.; increase of rent, 102–103; increase of purchase price, 103; vendee of land giving part payment, 104; selling another's merchandise at half profits, 107, 110; raising animals at half profits, 108–110; retailer to bear no losses, 108 n.; to bear all losses, 110 n.; future sale of fruit, 112; when market price is known, 113 n.; when vendor is possessed of merchandise, 113–114; when subject-matter is manure, 115–116 n.; loan of merchandise to be paid in kind, 116, 118; labor paid with labor, 119–120

Usury, rabbinical and biblical, 98, 99; recovered by debtor, when, 99; defense of, not available at law, 99; living in debtor's premises, 101–102; question of, cannot be raised when there is no debt, 103 n.; non-Israelites, from and to, 110; money belonging to, may be lent upon, 112 n.; among the neighboring nations of the Jews, 115 n.; advance and postpaid, 120; persons violating commandments, relating to, 121; consisting of mere word 121

W

Wages, when collectible, 177–178; laborer employed by the hour, 178 n.; violating commandments concerning payment of 177 n.; employee making no demand, 178; applies to payment for use of implements, 178; employer giving order to third party, 179; proselyte, applies to, 180–181; collected with oath, when, 179–180; employee not bound to accept material as, 191

Wall, falling into public thoroughfare, 190; owner to prove it was properly built, 190 n.; notice given by court for removal of, 190 n.; falling into adjacent land, 190–191

Warranty, realty sold with, right of grantee, 17–18 n.

Watchman, his right to partake of fruit, 142

Well, when of essence of lease. (*See* Lease.)

Wife (*see* Bailee; Lost Articles), right of, to sell husband's property, 24 n.

Wine, not to be sold when adulterated, 95

Will, duty of one finding, 20; legator consenting, 22 n.; heirs of legator consenting, 23 n.; delivery of no validity without, 20 n.; revocable, 22 n.

Wrong, done by means of words, 93; party guilty of, to suffer inevitable loss, 57 n.

UNIVERSITY OF CALIFORNIA LIBRARY

Los Angeles

This book is DUE on the last date stamped below.

A REC'D LD-URL

NOV 0 4 '9

REC'D LD-URL

OCT 2 2 1991

DEC 1 8 1991

41584

L 006 376 348 6

UC SOUTHERN REGIONAL LIBRARY FACILITY

AA 001 299 327 5